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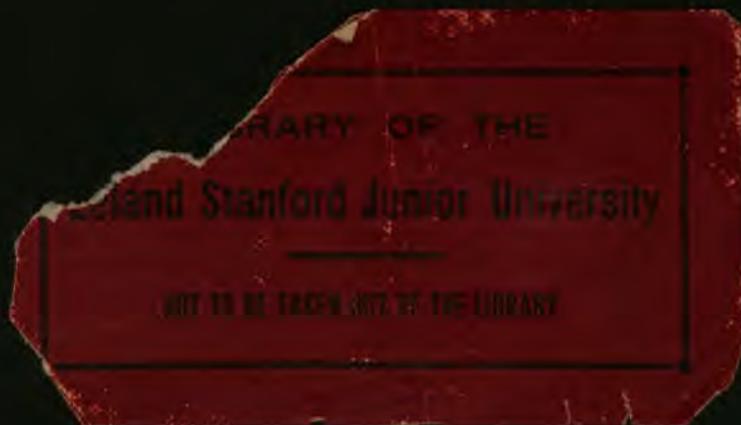
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PATTEE'S  
ILLUSTRATIVE CASES  
IN REALTY  
PART II—ESTATES





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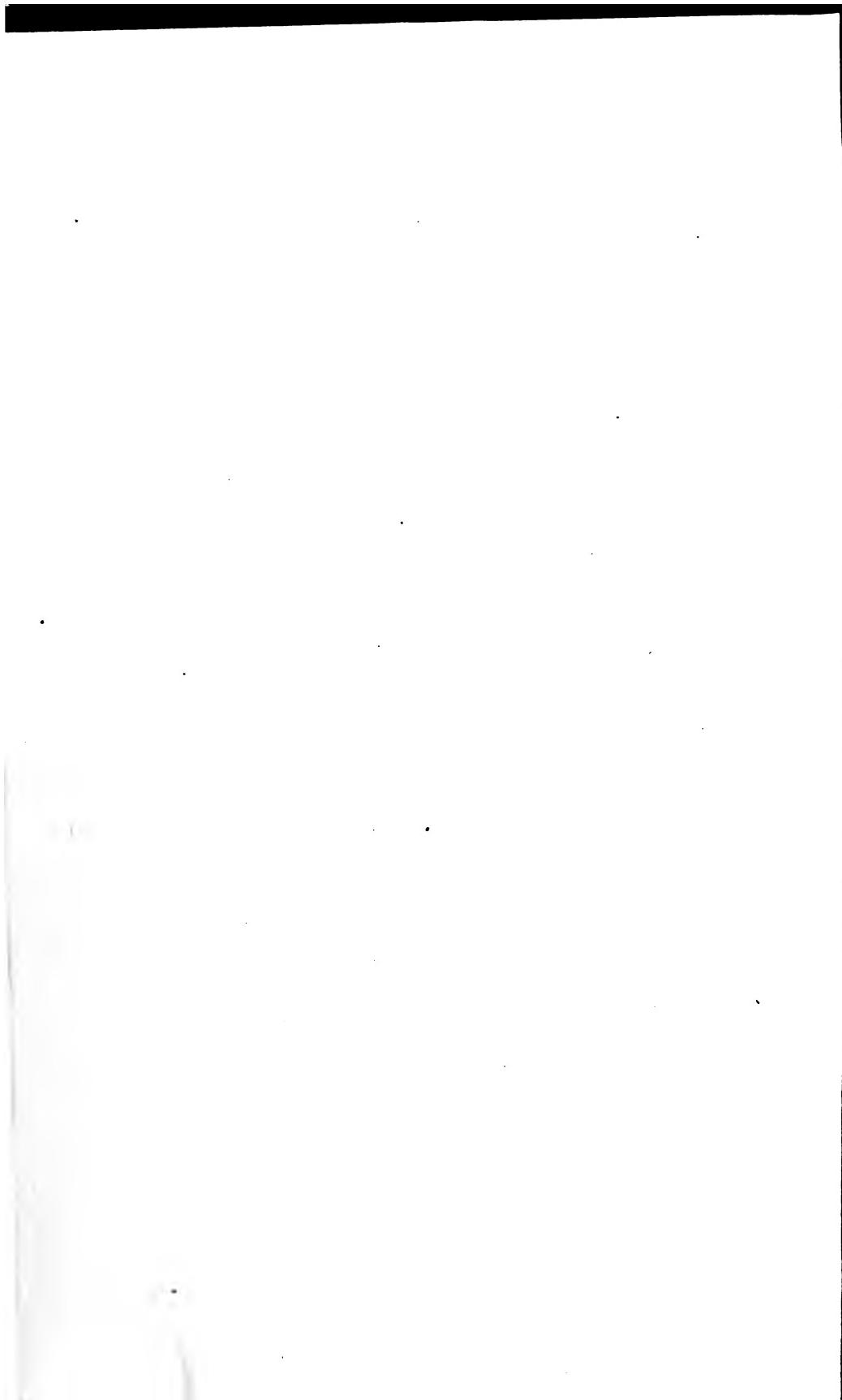
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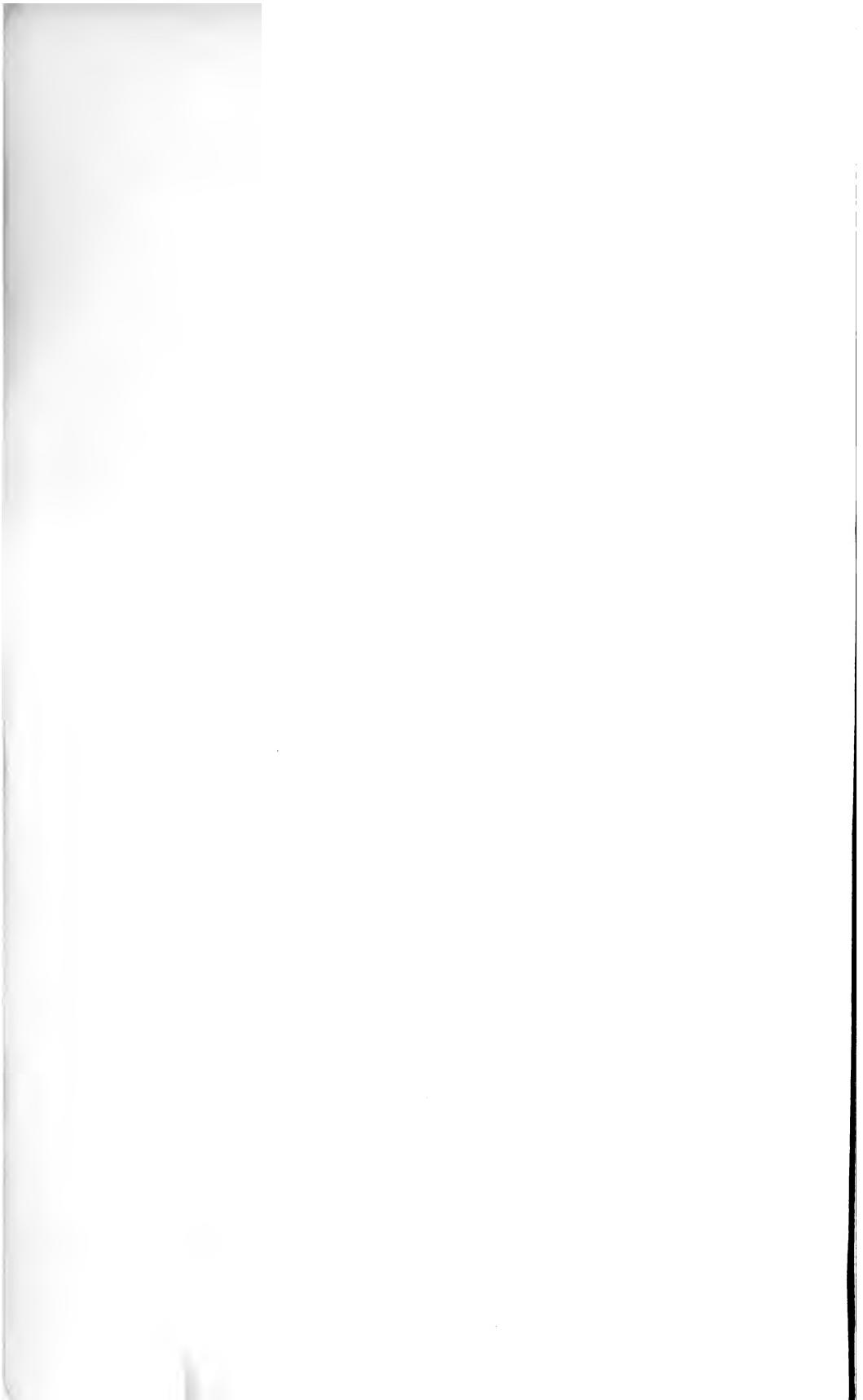
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**March 15th, 1895.**



---



*Nathan Abbott*

# ILLUSTRATIVE CASES IN REALTY.

BY  
**W. S. PATTEE, LL. D.,**  
DEAN OF COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.

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## PART II. ESTATES IN LAND.

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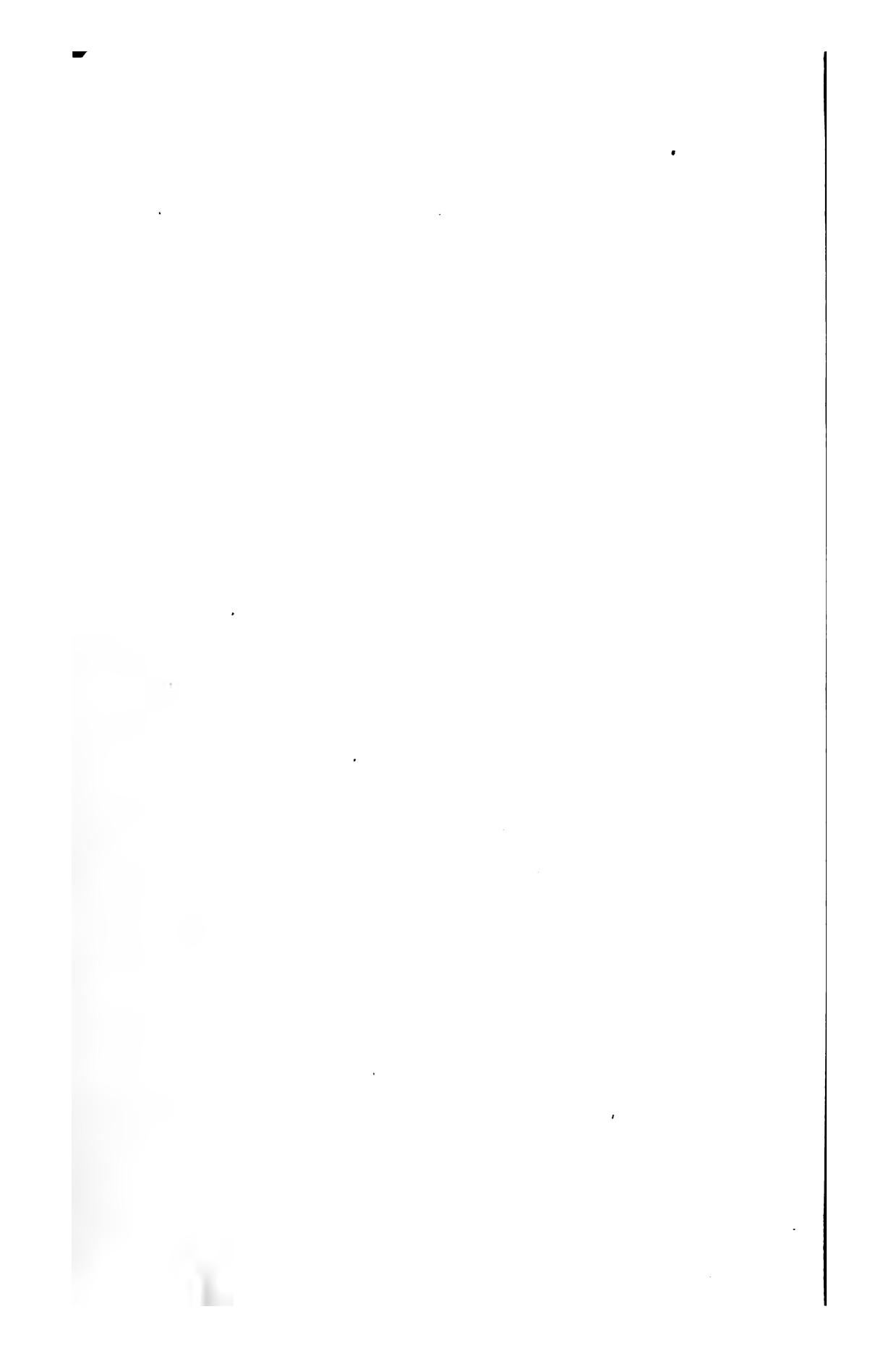
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PART II of "Illustrative Cases in Realty" has been delayed, partly on account of the great difficulty in selecting cases from such a vast number as exist upon the subject. The "Cases" on Realty are intended as simply an outline to guide the student, while in the lectures that accompany them the details are supplied; and the cases cited after each proposition, and others cited by the lecturer, serve to familiarize the student with the limitations of the principle and its exceptions, if any. Placing the proposition at the head of the case, in black-faced type, emphasizes it and perhaps improves the appearance of the page. The emphasis, however, is the main thing, as the first object must be to acquire an accurate knowledge of fundamental law, and thereafter and thereby to acquire the power of correct application. The "Cases" on Title it is now hoped will be in print in a few weeks, which will complete the series of "Cases" on Realty.

W. S. PATTEE, LL.D.,  
*Dean of the College of Law.*

UNIVERSITY OF MINNESOTA,  
MINNEAPOLIS, MINN., FEBRUARY 1, 1895.



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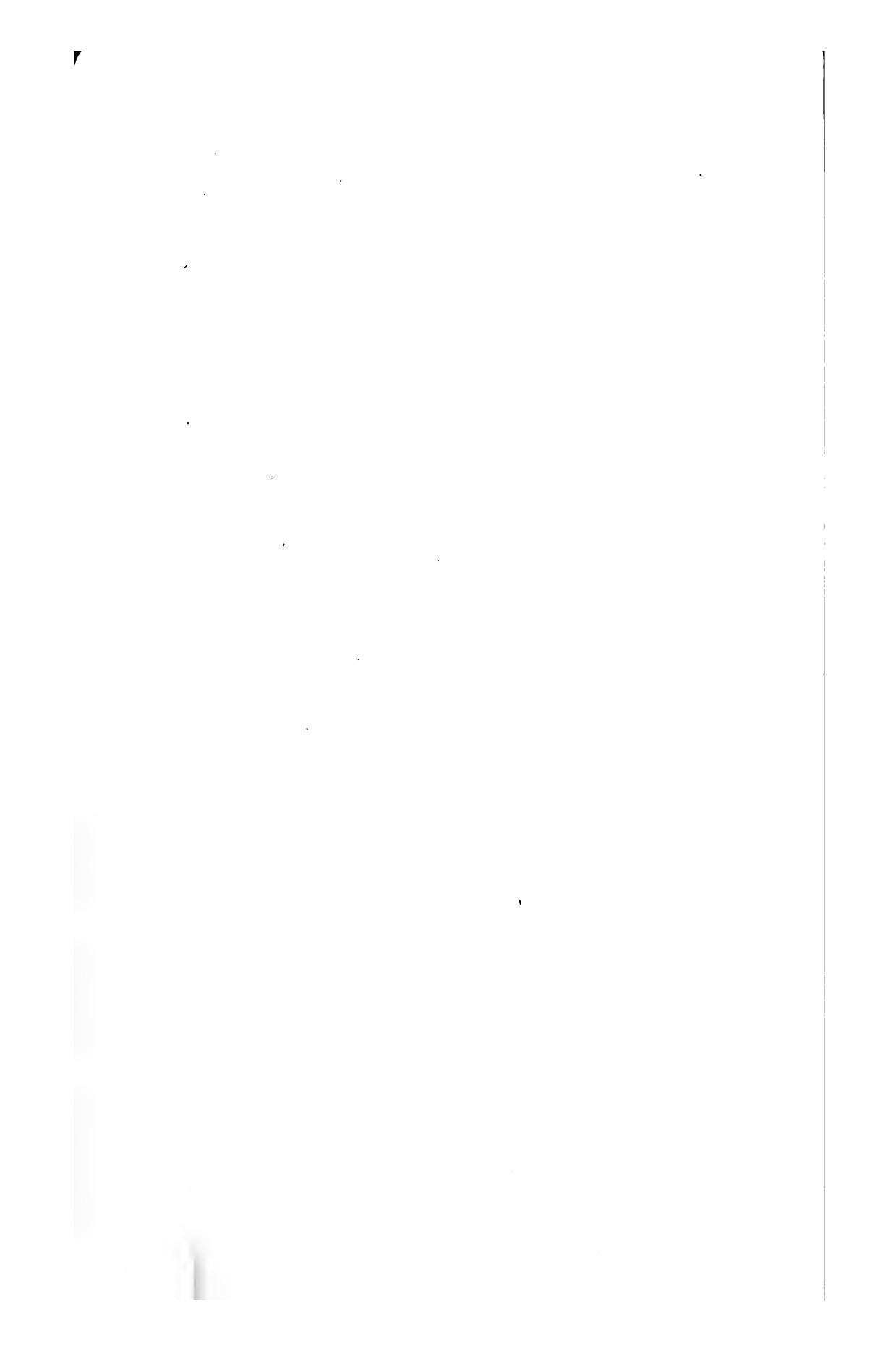
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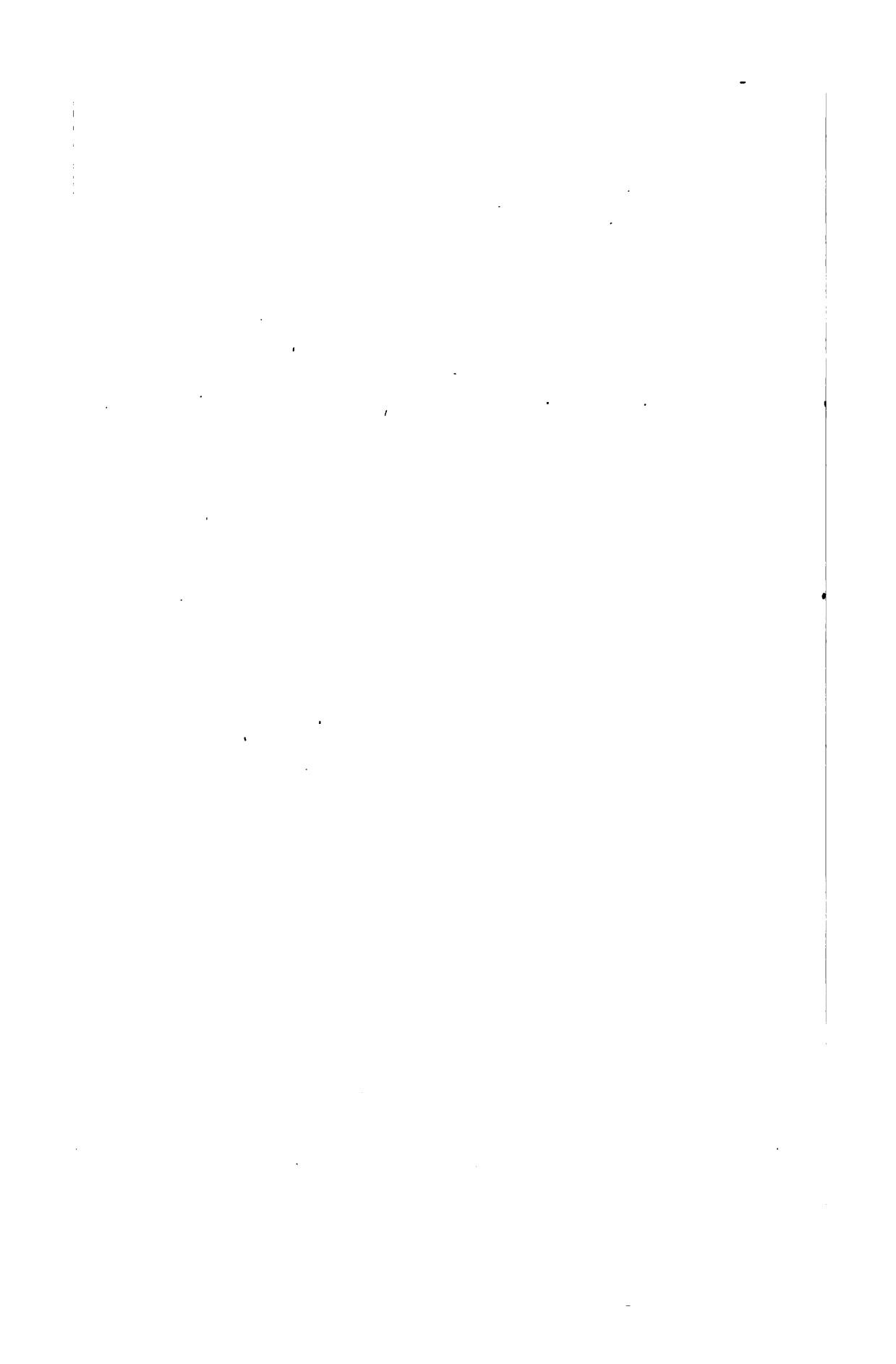
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## ILLUSTRATIVE CASES

IN

## REALTY.

---

### ESTATES IN LAND.

An estate in land is the *quantum* of interest which a person may hold therein.

#### I

### FREEHOLD ESTATES.

A freehold estate is an estate of inheritance, or for life, in land, and at common law could be created only by livery of *seisin*.

CUTTS *v.* COMMONWEALTH,  
Supreme Judicial Court of Massachusetts, 1807.  
2 Mass. 284.

SEDGWICK, J. This case is brought before the Court by a writ of error, which complains of a judgment of the Court founded on a suit in favor of the Commonwealth against the plaintiff in error, instituted by the solicitor-general, by the order of a special resolve of the Legislature, in pursuance of the Act passed June 18, 1791, "directing the manner in which inquests of office shall be taken to revest real estate in the Commonwealth, or to entitle the Commonwealth thereto."

This writ is grounded on the second section of the statute,

which enacts "that in all other cases, where an inquest of office is necessary by law to entitle the Commonwealth to hold lands, tenements, or hereditaments, such inquest shall be taken by the Supreme Judicial Court, in the county where such estate lies, upon information of the attorney-general describing" (among other things) "the estate claimed, and the title set up thereto, by the Commonwealth."

As this is a prosecution instituted by statute, in which, from the nature of the subject, the government, the party plaintiff, is the whole people, against an individual or individuals, the party defendant; and against whom the Judges are inevitably interested, it becomes important that none of the guards, which the law has provided for the security of the defendant, should be dispensed with. The statute, as recited, has rendered it necessary that the information should describe, 1st, *The estate claimed* by the Commonwealth, and 2d, *The title set up thereto* by the Commonwealth. If the information on which the judgment was founded was deficient in describing *the estate claimed* by the Commonwealth, or *its title thereto*, the judgment must be reversed ; then—

1. Does the information describe the *estate* which the Commonwealth claims in the demanded premises? By "estate" in land, I understand, the kind and *quantum* of interest therein. This interest may be a freehold, or of an inferior degree. A freehold may be of inheritance or for life. If of inheritance, it may be pure or base, absolute or conditional, in fee simple or fee tail. If fee tail it may be general or special. If for life it may be for that of the tenant or of another person, with or without impeachment of waste, absolute or conditional. If the estate be less than freehold, the term may be of greater or less duration, and with duties to the superior, more or less burthensome. In short, an *estate*, in real property, is susceptible of every possible variation in which man can be related to the soil. When the government claims, against an individual, lands in his possession, it is proper that the law should provide, as this Act does, that the "estate claimed," *the kind and quantum of interest* therein, should be described. Indeed this

is necessary, ordinarily, in controversies between private persons. Was this done by the information in this case? I think not. After describing the land to which claim is laid, the information says, "which tract of land the Commonwealth are entitled to hold and possess." Here, certainly, the *estate* claimed by the Commonwealth is not described. Nothing could have been less precise and more indefinite than the words "hold and possess" as descriptive of an estate in lands; they apply equally to many kinds of estates. The information gives no other description of the *estate* of the Commonwealth in the lands demanded than by describing *that* derived from Sir William Pepperell. And there is no other *estate* intended to be described as derived from him but what is expressed by the allegation that he "was seized and possessed, and entitled to be seized and possessed of the tract of land" demanded. Here again the words, descriptive of the estate of Sir William are altogether vague and indefinite. The information then does not "describe" the *estate*, the kind and *quantum* of interest claimed in the land demanded.

2. The remaining question is, whether the *title set up*, by the information, to the lands demanded, is such as would authorize a judgment for the possession, in favor of the Commonwealth? The title set up is an Act of the government, passed on the 30th of April, 1779, "to confiscate the estates of certain notorious conspirators," etc. In this Act, among others, Sir William Pepperell is named, and it enacts "that all the goods and chattels, rights and credits, lands, tenements, and hereditaments of every kind, of which any of the persons before named were seized or possessed, or entitled to possess, hold, enjoy, or demand, in their own right, or of which any other person stood, or doth stand seized or possessed, or are or were entitled to have or demand to and for their use, benefit, and behoof, shall escheat, inure, and accrue to the sole use and benefit of the government and people of this State, and are accordingly declared so to escheat, inure, and accrue; and the said government and people shall be taken, deemed, and adjudged, and are hereby accordingly declared to be in the real and actual

possession of the goods, etc., lands, etc., without further inquiry," etc. To this there is a proviso, in these words: "*Provided always*, that the escheat shall not be construed to extend to, or operate upon any goods, chattels, rights, credits, lands, tenements, or hereditaments, of which the persons aforesigned and described, or some other in their right and to their use, have not been seized or possessed, or entitled to be seized or possessed, or to have or demand, as aforesaid, *since the 19th day of April, in the year of our Lord 1775.*"

From this recital it is manifest that to derive a title to any lands, from the seisin or possession of a conspirator, named in the Act, to the Commonwealth, it was necessary, 1st, that the person from whom the title was derived should have been seized or possessed, *in his own right*; and 2d, that such seisin or possession should have been since the 19th day of April, 1775, and before or at the time of passing the Act. The Act, however just or necessary, was certainly rigorous, and must therefore have a strict construction. Now the information does indeed say that Sir William Pepperell was seized and possessed of the land described, but it does not aver that it was *in his own right*. He might have been seized and possessed, in trust or in the right of another, of the land demanded, and yet no title derived, by the Act, to the Commonwealth. Again, to derive a title from Sir William to the Commonwealth, he must have been seized *since the 19th day of April, 1775*, and before the 30th day of April, 1779. But the allegation in the information is that *prior* to the 19th day of April, 1775, and *since that time*, he was seized and possessed. All this might be true, and yet the lands demanded not be confiscated by the Act. This allegation may be all true, and yet the whole time within which the Act required a seisin and possession, to give effect to the confiscation, excluded. The title *set up*, therefore, is wholly defective, and cannot be aided by the verdict.

I have not incumbered my opinion with a recital of the errors assigned by the plaintiff, because it was found to be unnecessary, from the view taken of the case by the Court. We

are all of opinion, for the reasons which I have stated, that the judgment must be reversed.

WILLIAMS, R. P. 22; 2 Bl. Comm. 104; *Van Rensselaer v. Poucher*, 5 Denio, 35; *Jackson v. Parker*, 9 Cowen, 73; *Moody v. Farr's Lessee*, 33 Miss. 192; *Bridgewater v. Bolton*, 6 Mod. 106 (note); *Gage v. Scales*, 100 Ill. 218; *Wyatt v. Irrigation Co.*, 18 Col. 298.

## A

### FREEHOLD ESTATES OF INHERITANCE.

#### 1

#### A FEE-SIMPLE ESTATE.

An estate in fee simple is a freehold estate of inheritance without condition or limitation, and of indefinite duration.

JACKSON *v. VAN ZANDT*,

Supreme Court of Judicature, New York, 1815.

12 Johnson, 169.

THOMPSON, C. J., delivered the opinion of the Court (SPENCER, J., dissenting). The grounds upon which the plaintiff's counsel rested their argument, to show that the Act of 1782 did not reach their case, were,

1st. That the Act did not operate prospectively.

2d. That it did not give to the tenant in tail, a fee simple absolute, but only operated as a repeal to the statute *de donis*, leaving the estate a conditional fee, as at common law.

With respect to the first objection: it is true, that the Act is not drawn with skill and accuracy; and, according to strict grammatical construction, may be liable to the criticism made by the plaintiff's counsel. But the sense and meaning of the Act, and the intention of the Legislature, cannot be mistaken. It is a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the

Legislature to be extracted from the whole; and when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the Legislature be plain: 2 Cranch, 386.

It is a first principle in legislation, that all laws are to operate prospectively. And it appears to me that it would be doing great violence to the intention of the Legislature, to limit this Act to estates tail then existing. This would be comparatively doing nothing. It would be obviously against the general scope and object of the statute, which was to abolish entails. It is a settled rule of construction, that when the words of a statute are obscure or doubtful, the intention of the Legislature is to be resorted to in order to find out the meaning of the words. This intention is sometimes to be collected from the cause or necessity of making the statute. And whenever the intention can be discovered, it ought to be followed, with reason and discretion, in the construction although it seems contrary to the letter of the statute: 6 Bac. Ab. 384. If this be a sound rule of interpretation, and of which there can be no doubt, it must apply with great force to the case before us. And, indeed, the intention of the Legislature is so obvious, that it was not pretended to be denied by the plaintiff's counsel in the argument. The Act of 1787, by which the premises in question are given to Richard Penn Hicks, is a strong legislative construction of the Act of 1782. For it was obviously made for the express purpose of carrying into effect the will of Thomas Hicks, according to the intention of the testator. It alleges, by way of recital, that, were it not for the late Acts abolishing entails, Richard Penn Hicks would have become seized in fee tail general of the premises in question. But by such law the estate in fee tail general, devised to Mary Hicks was converted into a fee simple, and she, having been born out of lawful wedlock, could have no heirs, by means whereof the lands escheated to the people. It is no answer to this argument that this is a private Act, and the suggestion made by the party. This is true where the suggestions are matters of fact, but that is not the case here.

There was an alleged construction of a public Act, and which the Legislature were bound to look to and adopt or reject, as, in their judgment, the Act would warrant. And if the Act of 1782 did not extend to this case, most certainly the Act of 1787 ought not to have been passed. In my opinion, therefore, the Act of 1782 must have a prospective operation, and apply to the will in question.

Nor is the other ground of argument, in my judgment, better founded. This seems to have been suggested by the difference in the phraseology between the Acts of 1782 and 1786. By the former, the estate in fee tail is converted into a *fee simple*, and by the latter into a *fee simple absolute*. This difference, however, does not extend throughout the Act, for, in the second section of the Act of 1786, the term *fee simple* is used in the same sense with *fee simple absolute* in the first section. But if it were not so, it would make no difference in the construction of the two statutes. The terms *fee simple* and *fee simple absolute* have one and the same meaning. Littleton (sect. 1.) says, a tenant in *fee simple* is he who hath lands or tenements to hold to him and his heirs forever; and it is called *fee simple*, or *feodum simplex*, because it signifies a lawful and pure inheritance. Coke, in his Commentary, adopts the same definition, and says, that *simple* is added to *fee* for the purpose of showing that it is descendable to the heirs generally, without restraint to the heirs of the body, or the like. And he uses the terms, *simple* and *absolute*, as synonymous, when subjoined to *fee*. Thus, says he, the more apt division of a *fee* is into *fee simple* or *absolute*, *conditional*, and *qualified* or *base*. For the word *simple* properly excludeth both conditions and limitations that defeat or abridge the *fee*. It would be a very strained construction of the Act of 1782, to say it only converted *fee tails* into *conditional fees*, as at common law. The result of the opinion of the Court accordingly is, that the Act of 1782 operated prospectively, and of course extended to the will of Thomas Hicks; that the *fee tail general*, devised to his sister, Mary Hicks, was by the statute converted into an *estate in fee simple*. And if so, it is not denied but that the defendant has

shown a good title to the premises in question, and is entitled to judgment.

Judgment for the defendant.

WILLIAMS, R. P. 50; Tiedeman, R. P. 36; Van Rensselaer v. Poucher, 5 Denio, 35.

#### HOW CREATED BY DEED.

As a general rule the word "heirs" was necessary in instruments at common law to create a fee-simple estate.

BUFFUM v. HUTCHINSON,  
Supreme Judicial Court of Massachusetts, 1861.

1 Allen, 58.

MERRICK, J. This is a real action to recover possession of the tract of land described in the writ, being part of lot No. 6 in the third range which was laid out and assigned by the town of Lynn to Matthew Estes in 1706. The defendants derive their title by a regular series of conveyances from said Matthew Estes; deducing their title, among other conveyances, from deeds from the heirs of John Ireson and from Amos Dorman. Their title in this manner being shown to be complete, they are entitled to recover unless the objections relied upon by the tenants are sufficient to prevent it.

It is first objected that the defendants are estopped from setting up their title under the conveyance from the heirs of John Ireson, by reason of the covenants contained in a certain deed of partition made and executed by them and certain other persons, proprietors of certain parts of the tract of land known as the "Rocks Pasture." This deed bears date and was executed on the 22d day of November, A. D. 1813. By the terms of it, six acres and eighty poles in the sixth lot in the third range, on the eastern side of said lot, were set off and assigned to Jacob Ingalls. By the same deed, eight acres and one hundred poles were also set off and assigned to the heirs of John Ireson. Both of the lots thus assigned and set off to Jacob

Ingalls and the heirs of John Ireson include the demanded premises. And the several proprietors, parties to the said deed, "do for themselves, their heirs, executors, and administrators covenant and grant to each other that he or they shall thenceforward peaceably and quietly have, hold, possess, and enjoy the same" lots set off and assigned to them severally in and by said deed, "free from all right and claim whatsoever of them or either of them, or any person claiming from or under them, forever." The tenants insist that as the six acres and eighty poles set off and assigned to Jacob Ingalls include the demanded premises, the defendants are estopped, by the covenants of the heirs of John Ireson, from claiming the same under deeds from them. But whatever may have been the right of Jacob Ingalls, derived under the deed of partition, the tenants do not show that they are entitled to the rights thereby acquired by him. The tenants are the heirs-at-law of Jesse Hutchinson, Jr., to whom the demanded premises were conveyed by the warranty deed of Sidney Ingalls. But it does not appear, nor is there anything in the facts reported to show, that there was any connection between him and Jacob Ingalls, or that the title of the latter, whatever it was, ever came to him. On the contrary, the defendants hold under deeds from the heirs of John Ireson, to whom the same demanded premises were, by the deed of partition, in direct and explicit terms assigned and set off. As against all persons, therefore, except Jacob Ingalls, they had a clear and complete title; and as Sidney Ingalls shows none derived from Jacob Ingalls, neither he, nor the tenants claiming under him, can insist upon an estoppel by force of the covenants in the deed of partition.

But the defendants, in tracing their title from Matthew Estes, hold under a deed from Amos Dorman, as one of the intermediate conveyances. And the tenants claim that they derive title from the deed of Dorman dated January 4, 1847, written on the back of a deed of Sidney Ingalls to Jesse Hutchinson, Jr., of the same date. It does not appear from the facts reported whether this deed of Dorman was made before or after the conveyance by him of the demanded premises under which the

demandants derive their title; if it was afterward, it is very clear that Hutchinson could take nothing by it. But whether it was before or afterward is immaterial to the present issue; because the deed which names no grantee, but which being written on the back of the deed to Jesse Hutchinson, Jr., it is contended must be construed to be a conveyance to him, contains no words of limitation, and therefore conveyed only a life-estate. The word "heirs" is essential in a deed of conveyance to create an estate in fee; and if a man purchase lands to himself forever, or to him and his assigns forever, he takes only an estate for life: 4 Kent Com. 6. The grantee, Jesse Hutchinson, Jr., having deceased, the life-estate which he acquired by the deed of Dorman, if in fact he took anything by it, is at an end; and the tenants therefore cannot avail themselves of the estate thus conveyed.

The tenants, however, further rely upon a deed of Dorman to Albourne Oliver, conveying a certain undivided part of the land in "Rocks Pasture," in which he excepts, among other lots, "about two-thirds of the sixth lot in the third range of said 'Rocks Pasture,' sold to Jesse Hutchinson." This exception has some tendency to show that he had made a conveyance of some estate to Hutchinson; but as the only conveyance of that kind shown to have been made by him is by deed, and written on the back of the deed of Sidney Ingalls, and as that was the conveyance only of a life-estate, which has been terminated by the death of the grantee, the tenants obviously can derive no advantage from it.

It follows from these considerations that the exceptions to the rulings of the presiding Judge cannot be sustained, and that the verdict for the demandants is to stand, and judgment is to be entered upon it.

Exceptions overruled.

ARMS v. BURT,  
Supreme Court of Vermont, 1827.  
1 Vt. 303.

HUTCHINSON, J., delivered the opinion of the Court:

The plaintiff's title, being by virtue of a levy of an execution in his favor against one Erastus Burt, the great questions that arise are, whether Erastus had any title that could pass by levy? and whether this levy is sufficient to vest that title in the plaintiff? The case allowed shows the title to the premises once in Jonathan Burt, the defendant, and also, that, whatever title Erastus Burt had at the time of the levy, he derived from said Jonathan, by virtue of the lease referred to in the case.

Upon the trial at the County Court the counsel for the defendant rested their defense principally upon the writing signed by said Jonathan and Erastus in the margin of the record of said lease. This was relied upon as a surrender by Erastus of the lease, and all his interest derived from it, to said Jonathan. We are now called to decide the legal effect of that writing. But the nature of the lease must be first understood.

The lease is not a lease for years merely; but conveys a present fee, determinable upon the non-performance, by Erastus, of the conditions and duties named in the lease on his part to be performed. It has the formalities of a deed, signed, sealed, witnessed, and recorded. It runs to him, his heirs, and assigns; and continues so long as *wood grows and water runs*. These terms extend as fully beyond the use of land as the term *forever*.

But this title was to cease, and the land revest in Jonathan, upon the failure of Erastus to perform the stipulation on his part. Now, what should be the effect, upon this lease, of the writing in the margin of the record, signed by the parties to the lease?

It probably is not what was intended by the parties. It is not a conveyance back of the estate, for it has no seals nor acknowledgment. Nor can it be a discharge of the covenants of

Erastus, for it contains no consideration. None is pretended but mutuality, and that does not exist. Nothing passes, or is discharged, from Erastus to Jonathan, to stand as a consideration for the discharge of Jonathan's claim on the covenants of Erastus. This writing, as it now appears, must be wholly inoperative. It can neither be a surrender nor discharge of the title of Erastus, nor discharge of his covenants. Had it been so executed as to reconvey the estate to Jonathan, that would have formed a good consideration to support the same instrument, as a discharge from Jonathan to Erastus of his covenants.

The case shows that the defendants, on trial, offered to prove a failure of Erastus to perform the conditions of said lease, on his part, before said writing in the margin was executed, and also that ever since that time, he has wholly abandoned the premises, and neglected every stipulation of the lease. This was rejected by the Court, and probably ought to have been admitted; it certainly ought, if it had been offered in connection with evidence to show that said Jonathan had re-entered upon the premises for a breach of condition. The nature of the lease being as above described, Jonathan was not obliged to re-enter; but might stand aloof and rely upon his remedy upon his covenants against Erastus. Or if he chose to re-enter upon breach of the condition, he might do so, and thereby the estate would vest in him; and Erastus be no longer liable for that support he had covenanted in the lease. And the recovery of Jonathan upon his covenants in such case, would only be for the damage he sustained before his re-entry. But it seems Jonathan was in possession before this suit was brought. Probably, that might have been urged as a sufficient re-entry to vest the estate.

Now, if such an estate as Erastus had in the premises be liable to levy of execution at all, the plaintiff, by his levy, could gain no better or greater estate than he found in Erastus. That is, a present estate in fee, to hold upon the performance of that multifarious condition; and, on failure to perform, lose the estate wholly, by its reverting to said Jonathan.

As the merits of this part of the case have not been tried at all, a new trial must be granted.

An objection is now raised to the levy under which the plaintiff claims to have obtained the title of Erastus Burt. This passed *sub silentio* at the trial; but as the case is drawn up, this question is now fairly presented. As a new trial is granted, we are disposed to inform the parties what views the Court entertain upon this point also.

Upon recurrence to the levy, we find that the officer did not levy upon the land, but upon the right, title, and interest of Erastus Burt in and unto the land. The land itself is afterward well described; and the officer returns that the appraisers appraised the premises. Yet the word *premises* must mean what was levied upon, which we find to be Erastus Burt's interest in the land. The levy should have been upon the land itself, and the appraisal should have been of the land itself, subject to such an incumbrance, describing it particularly.

As the levy is, we may ask, what interest had Erastus in the land? What did the sheriff suppose it to be? What did the appraisers suppose it to be? The learned counsel here in Court differ much about this interest; and how can it be ascertained how the appraisers viewed it?

In the case of *Elijah Paine v. Lindley Webster et al.*, decided at St. Albans, on the present circuit, a similar question was raised and fully considered, and the levy considered void. We consider this levy void also. A new trial is granted.

WILLIAMS, R. P. 144; *Jackson v. Myers*, 3 Johns. 388; *Society v. Sharon*, 28 Vt. 603; *Sisson v. Donnelly*, 36 N. J. L. 432; *Edwardsville Ry. Co. v. Sawyer*, 92 Ill. 377; *Foster v. Joice*, 3 Wash. C. C. 498. *Contra: Merritt v. Disney*, 48 Md. 344; *Cole v. Lake Co.*, 54 N. H. 242.

## EXCEPTIONS.

a

**When created by will the word "heirs" is not necessary.**

**CAMPBELL v. CARSON,**  
**Supreme Court of Pennsylvania, 1825.**

**12 S. & R. 54.**

DUNCAN, J. The will of George McDowell gives rise to this controversy. The question raised by it is: Whether the testator devised to his wife Frances, his lands in Westmoreland County, in fee, or she only took a life estate? The devise is as follows: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner and form: First, I give and bequeath to Frances McDowell, my dearly beloved wife, whom I likewise make my sole executrix of this, my last will and testament, all and singular my lands, messuages, and tene- ments in Westmoreland County, to be by her freely possessed and enjoyed." He then bequeaths to her certain specific legacies, and then proceeds: "I also bequeath to my niece, Martha Glyn, a certain tract or piece of land, situate in West- moreland County aforesaid, containing one hundred acres lying on the east side of the spring on the said land." The testator died without issue. The lands in Westmoreland County were held by settlement right. The testator had been driven from them by the Indians some years before he made his will, and the settlers had not returned. If one traveled out of the four corners of the will, in search of the intention of the testator, it would be inconceivable that he could intend a life estate in a small improvement, without other than cabin buildings, deserted for years, and the cleared land again grown up, on which no purchase-money had been paid, and depending on the will of the Legislature, which might, by not extending the time of payment, cast the whole burden of it on the tenant for life, or make void the inceptive right. But the case does not require us to make a distinction between such an inceptive

title and one consummated by patent. In every case, where a testator devises his land without more, his *prima facie* intention is to give the whole interest. Judges have found themselves constrained, however, to decide that the words, I devise my plantation, my farm, my house, my land, carry only an estate for life: 3 Cranch, 137. But where it appears from the whole will taken together, that the testator intended a fee, if there are any words equivalent to perpetuity, it will be held a fee, and the constant struggle of the Courts has been to seize hold of any word or any provision to effectuate the intention. Where anything is directed to be done, or any intention of the testator to be accomplished, where the words of the devise give only an estate for life, and where such estate would be insufficient to answer the end a fee passes. The implication must be necessary or manifest, and not dubious or merely probable. Where, from the whole context of the will, it appears the testator intended a fee, and the conscience of a Judge so informs him, it is his duty to construe it a fee. I do not mean by this that the words land, plantation, farm, house, *ex vi termini* will do; but any words in the will showing the testator did intend a larger estate than for life, or such larger estate is necessary to answer his declared purpose, to accomplish his views. Every case of this sort depends on its own particular circumstances, and is individual. In construing a will, though a fee is not given by the devising clause, yet, if there is anything on the face of the will to indicate an intention to give a fee, any words *equivalent* to words of perpetuity, anything in the four corners of the will from which a fair and demonstrable inference can be drawn of an intention to give a fee, to the disinheriton of the heir, a fee will pass. Equivalent words do not depend on their technicality, but on their reasonable construction, their plain, natural meaning. I will instance some cases in which the words have been construed as tantamount: I devise all I shall die possessed of: I devise my part; my share; my interest. So, a devise of land wholly to A.: all my worldly substance, or effects, real and personal: all my landed property. It is always a question of construction. If the

words denote only a description of the specific lands devised, and if no words of limitation are added, the devisee has only an estate for life. But if they denote the *quantum* of interest or property the testator had in the lands devised, the whole extent of his interest passes to the devisee. These very words—"to be by her freely possessed and enjoyed," have received a judicial construction; for in *Mudge's Lessee v. Blight*, Cowp. 352, a devise thus, "As touching my worldly estate, I devise the same as follows: to my two sons, T. M. and R. M., whom I make and ordain my sole executors, I give all my lands and tenements freely to be enjoyed and possessed alike," passed a tenancy in common, in fee, to T. M. and R. M. The free enjoyment must, as Lord MANSFIELD says, mean free from all limitations; that is, the absolute property. Subsequent cases in England may have put a different construction on the words, "freely to be enjoyed;" as free from impeachment of waste, free from incumbrances; but I am very free to declare that Lord MANSFIELD's construction is the most natural and reasonable, and that the other is but a remote probability; a possibility that the testator might so have intended them; but in my consideration they mean, the free enjoyment for all purposes against the heir. . This is the fair meaning, the natural, common-sense construction; the other is a forced construction, straining the words against their common use and understanding; not to effectuate, but to defeat the testator's intention. They have been construed by this Court according to their usual acceptation, and the understanding of all mankind. In *Willis v. Bucher*, 2 Binn. 464, the Chief Justice puts this construction on them; and again, words not so strong—"I give my plantation to my son John, for him to improve and enjoy the same," were held to pass a fee in *Hoge v. Hoge*, 1 Serg. & Rawle, 144. I have no disposition to recede from the liberal cast of cases which effectuate the intention of the testator; far from it; without a disposition to overturn any settled principle on the construction of limitations in wills, I feel a strong inclination to construe them by a rule of common sense, which is as strong as any case can be.

To give to words their natural sense, unless some obvious inconvenience or incongruity would result from such construction, is the cardinal rule in the construction of wills. In addition to the words—"freely to be enjoyed," which I consider words of perpetuity, if the prefatory clause declaring the testator's intention to devise his whole worldly estate is taken in connection with the devising clause, which is always done where there is a clear intention for the purpose of explaining or enlarging the estate, here there is such an evident intention without anything to disconnect, without any interposing clause, that I must lay hold of it to effectuate the clear intention of the testator to give his wife a fee simple. On this branch of the case, *Winchester's Lessee v. Tilghman*, decided by the Provincial Court of Maryland, and affirmed in the Court of Appeals, 1 *Harris & McHenry*, 452, in which it was held, that "as to the worldly estate it has pleased God to bless me withal," and after several intervening devises, "I give unto my daughter Eliza three hundred acres of land, lying in Kent and Queen Anne's Counties, called Pharsalia," passed a fee, is very applicable. The conclusion of law is not, where there is a devise of land, a plantation, a house, without more, that because a fee was intended, therefore a fee is devised; but it is quite certain that if the intention to devise a fee is evident and manifest from the general scope of the will, taking into view all the circumstances and clauses in the whole will, and uniting them together, it will be construed a fee, and it is not material what words are used, whether technical or not, the meaning and intention being thus collected from the words or by necessary implication.

Judgment affirmed.

*Godfrey v. Humphrey*, 18 *Pick.* 537; *Fox v. Phelps*, 17 *Wend.* 393; *Wood v. Hills*, 19 *Pa. St.* 513; *Morrison v. Semple*, 6 *Binn.* 94.

## b

**So in deed to trustee the word "heirs" is not necessary.**

NORTH v. PHILBROOK,  
Supreme Judicial Court of Maine, 1852.  
34 Me. 532.

RICE, J. This is a petition for partition. The rights of the petitioner depend upon the provisions of a deed from Joseph North and Hannah North to Henry W. Fuller, dated January 7, 1814, and a deed from Gershom North to James P. Philbrook, dated November 17, 1846.

The original estate was in Joseph North and Hannah North, his wife, in right of the wife. Gershom North was a son of Joseph and Hannah, who also had other children and heirs, and the petitioner is a daughter of Gershom.

Hannah North, one of the grantors to Fuller, died in February, 1819, and Joseph North, the other grantor to Fuller, died April 17, 1825. Ann North, wife of Gershom, deceased before her husband, but after the decease of both Hannah and Joseph. Subsequent to the death of Ann, Gershom married again, and died March 4, 1849, leaving the petitioner, a minor daughter by his second wife, his only heir.

The deed of trust from Joseph and Hannah North to Fuller contain no words of inheritance. The first point raised at the argument was as to the character of the estate which passed to the trustee by that deed. The petitioner contended that it was an estate of inheritance, because nothing short of such an estate would enable the grantee in that deed to perform the trusts provided in the deed, and carry out the manifest intention of the grantors.

As a general rule, such a quantity of estate will be held to be vested in trustees as is required for the performance of the trust; and therefore if land be given to a man, without the word heirs, and a trust be disclosed which can be satisfied in no other way but by the trustee's taking an inheritance, it has been held that a fee passes; so where there is a trust for

sale, that is a purpose which it is impossible to serve unless the trustee have an inheritance, "for if they are to sell a fee, they must have a fee:" Crabb on Real Property, § 1831, p. 594. So a trust to sell, even on a contingency, confers a fee simple as indispensable to the execution of the trust: Lewin on Trust and Trustees, 235.

Trustees must in all cases be presumed to take an estate commensurate with the charges imposed on them: 7 East, 99. Therefore, where lands are devised for a particular purpose, without words of inheritance, and the death of the devisee may defeat the object of the devise, he will take a fee. This doctrine is frequently applied to trusts created to support estates of inheritance: 8 Vin. Abr. 262, pl. 18.

When lands are granted to a trustee without words of perpetuity, he will by implication of law take a fee, if such estate be necessary to fulfill the objects of the trust: Welch *v.* Allen, 21 Wend. 147.

The grant to Fuller not only authorized him to go into the immediate possession of a portion of the estate, but also, to "sell so much of the above-granted premises and execute a good and sufficient deed thereof, as shall amount to the sum of \$800," for the purpose of building a house, but further stipulated that, "provided the said land shall not have been sold nor the said building erected, during the lifetime of the said Joseph, the said Fuller is hereby authorized, after the decease of the said Joseph, to sell so much of the above-granted premises as shall amount to the above sum and for the purpose aforesaid, out of such part of the premises as he shall think proper."

To comply with these provisions it would seem to be necessary that the trustee should have an estate in fee, and that such was the intention of the grantors is obvious when all the provisions of the deed are taken into consideration.

The estate of the trustee being thus enlarged, by operation of law, its operation upon the rights of other parties must be considered. The grantors reserved to themselves, during their natural lives, the use of the principal part of the estate, re-

mainder over to Gershom and Ann North during their natural lives, and lastly, after the death of Gershom and Ann, so much of the estate as remained unsold "to descend to, and vest in, the heirs of Joseph North and Hannah North, his wife."

At what point of time did the estate vest in the heirs of the grantors? This question was much discussed at the argument. But from the view we take of the case it is wholly immaterial, so far as the rights of the petitioner are involved, how this question is determined, and it is therefore unnecessary at this time to enter upon a discussion of the distinctions which exist between vested and contingent remainders. The rights of other parties, not now before the Court, may be found more involved in the consideration of that branch of the law.

If, as is contended by the respondents, the heirs of Joseph North and Hannah North became known at the death of Joseph, and the remainder then vested in these heirs, with the right of possession of the estate after the decease of Gershom and Ann, then as a legal consequence, Gershom, being one of the heirs of Joseph and Hannah, became seized of a vested remainder in fee, which being a transferable interest, passed by his deed, dated November 17, 1846, to Philbrook, leaving no interest to be inherited by his daughter, the petitioner.

If, on the other hand, as is contended by the petitioner, the estate remained contingent until the death of Gershom, and then, according to the terms of the deed of trust, vested in the heirs of Joseph and Hannah, the petitioner is equally excluded. She being the heir of Gershom and not the heir of Joseph and Hannah, and the interest of Gershom according to this construction of the deed being an equitable life estate only.

But it is strenuously contended that the petitioner is the heir of her grandparents, Joseph and Hannah North, and therefore entitled to recover.

In a recent case in Massachusetts, *Brown et al. v. Lawrence et al.*, 3 Cushing, 396, which in all material points is strictly

analogous to the case at bar, this question was distinctly before the Court, and directly decided. The action in that case was brought by grandchildren of the grantor, claiming as heirs of the grantor after the termination of an intervening life estate in their father, who during his life, had aliened his interest in the estate.

In giving the opinion of the Court, SHAW, C. J., says: "They cannot make themselves heirs of the grandfather, because their father, through whom they must claim, was living at the time of their grandfather's decease; and it is only when a son or daughter dies before the father, leaving children, that such children are heirs of a grandfather, or other more remote ancestor. These children were not born when the testator died; their father was then his heir, and became a new stock of inheritance to these demandants. If the estate vested in him, he had a capacity to alienate it, and did alienate it, by his deed to the city; if the estate did not vest in him, then nothing came to these demandants, as his heirs."

The Court are unable to perceive any principle upon which the petitioner can recover, and according to the agreement of the parties a non-suit must be entered.

*Neilson v. Lagow*, 12 How. 98; *Stearns v. Palmer*, 10 Met. 32; *Fisher v. Fields*, 10 Johns. 495; *Welch v. Allen*, 21 Wend. 147; *Newhall v. Wheeler*, 7 Mass. 189; *Gould v. Lamb*, 11 Met. 84; *Oates v. Cooke*, 3 Burrows, 1684.

## C

**So in the case of corporations.**

**WILCOX v. WHEELER,**  
**Supreme Court of New Hampshire, 1867.**  
47 N. H. 488.

BELLOWS, J. This cause is heard upon bill and answer. The defendants claim under William Simpson, alleging that by his deed to Mr. Britton only an estate for life was granted. The substance of that deed is, that, in consideration of

\$100 paid by said Britton, agent for the Proprietors of Orford Bridge, Simpson conveys to him for the use of that corporation, and to his assigns, two parcels of land, one being described as a road four rods wide from the bridge to the main road, and the other apparently for a toll house; to have and to hold the same to said Britton in trust, as aforesaid, and to his assigns.

By his deed, by force of the statute of uses, the title vested at once in the corporation, as it had full capacity to take; and nothing indicates any purpose that the legal estate should be kept on foot in Mr. Britton. The conveyance was made to him, probably, because conveyances directly to corporations had not then become quite familiar. Had it been conveyed to the corporation directly, then, as a corporation aggregate never dies, it would be a fee simple without words of succession or inheritance. Had it been a sole corporation, words of succession would have been necessary.

This general doctrine is well settled: 4 Greenl. Crim. Dig. 279; 4 Kent's Com. 7; where it is said that the reason, why, in deeds to corporations aggregate, the word heirs or successors is not necessary, is, "because in judgment of law a corporation never dies, and is immortal by perpetual succession." So is Co. Lit. 9, 6.

Such being the law where the grant is directly to a corporation aggregate, it would seem not to be unreasonable to apply the same doctrine to a grant to a trustee for the use of such a corporation, when it is of such a character that the whole title at once vests in the corporation, making it substantially a grant to the corporation.

Upon this point the law is well established, that if there be a conveyance to a trustee, and the nature of the trust is such as to require a fee, then by necessary implication the trustee will take an estate of inheritance, although there be no words of limitation.

In the case of devises this has long been the law, and even where the purposes of the trust might *probably* be accomplished without a fee; or, in other words, if by *possibility* the

purposes of the will might not be answered without the trustee had a fee, the will would be so construed : *Shaw v. Weigh*, 2 Str. 798 ; *Willis v. Lucas*, 1 P. Wms. 472 ; *Collin's Case*, 6 Co. 16 ; and *Ackland v. Ackland*, 2 Vern. 687 ; *Gibson v. Montfort*, 1 Ves. Sen. 485 ; *Oates v. Cooke*, 3 Burr, 1684. So the interest to give a fee would be inferred from the fact, that, by possibility, a fee might be necessary to effectuate the trusts, and the leaning of the Courts was very strong so to construe a devise.

The same rules are applied to grants, and it was so distinctly laid down in *Cleveland v. Hallet*, 6 Cush. 403, by SHAW, C. J., as an exception to the rule requiring the use of the word *heirs* as well established as the rule itself, viz. : that when a conveyance is in trust, and the trusts are of such nature that they do, or by possibility may, require a legal estate in the trustee beyond that of his own life, then without words of limitation in the conveyance to the trustee, he shall take a fee.

In *Newhall v. Wheeler*, 7 Mass. 189-198, it was held, PARSONS, C. J., that though no words of limitation are used, the estate of the trustee shall be commensurate with that of the *cestui que trust*.

So is *Stearns v. Palmer et al.*, 10 Met. 32, where the grant was in trust for the use of "the inhabitants of the first parish in Springfield, and their heirs, forever, for a burying yard."

So is *Gould et al. v. Lamb et al.*, 11 Met. 84, where the conveyance is to A. B., to have, etc., as he is trustee under an indenture tripartite, which showed the intention to be to give more than a life estate; and so it was held that a fee passed without words of limitation.

So in *Brooks et al. v. Jones*, 11 Met. 191, which was a mortgage to W., treasurer of a corporation, to have and to hold, etc., to him, the said treasurer, and his successors in office, to his and their use and behoof forever, the condition was to pay a sum of money to the treasurer and his successors in office, and it was held that W. took a fee in trust for the corporation, although the word *heirs* was not used ; but the intention was plain, and no stress was put upon the term *forever*.

The same doctrine is laid down by Chancellor KENT, in *Fisher v. Fields* 10 Johns. 494, 505. So is *Villiers v. Villiers*, 2 Atk. 72.

In *Welch v. Allen et al.*, 21 Wend. 147, it is held that where lands are granted to a trustee without words of perpetuity, he will, by implication of law, take a fee, if such estate be necessary to fulfill the objects of the trust.

So the doctrine of *Cleveland v. Hallett*, before cited, is confirmed in *Attorney-General v. Prop. Federal St. Meeting House*, 3 Gray, 1.

The conveyance to Glen, Hall, Shaw *et al.*, for themselves, as a committee chosen and appointed by the congregation of the Presbyterian meeting house in Long Lane, etc., to have and to hold the land in their said capacity, and to their successors forever, but to and for the only proper use, and benefit, and behoof of the said congregation, forever, and for no other use ; and it was held that the trustees took a fee upon the principle before mentioned, and no stress is put on the word *forever*, and the corporation was not incorporated.

So in *King v. Parker et al.*, 9 Cush. 78, where the grant was to B., "in trust to and for the use of the Free Masons Lodge in Boston, known by the name, etc., to their only proper use, benefit, and behoof forever," it was held that this proved the fee.

The question, then, is, whether this conveyance to Mr. Britton, agent of the bridge corporation, to be held in trust for the corporation, passed the fee without words of limitation ; that is, whether the intention to give the corporation the fee can be gathered from the grant. Had it been directly to the corporation, being a corporation aggregate, the fee would have passed ; and in all such cases where the conveyance is through a trustee to hold for the use of such corporation, the intention to make it perpetual is to be inferred, and so are the Massachusetts cases already cited, we think.

Here the grant was of two pieces of land, for a road and toll house, both essential to the use of the bridge as much so as the land upon which stands the Federal Street Church ; and it

is impossible to suppose that it was intended to grant an estate for the life of Mr. Britton only, which might have ended in one year. Such being the case, it must be considered that the fee passed, and at once vested in the corporation.

In respect to some of the Massachusetts authorities, which hold that where the purposes of the trust cannot be answered without a greater estate than for life, then by implication a fee will pass, it is urged by defendants' counsel, that the intention to give a greater estate is manifested by the use of the term *forever*, which in this case is wanting.

It is obvious, however, that this term is not one of limitation, and only bears upon the question of intention, and if that is ascertained by the nature of the grant, or the language used, whatever it may be, the law will give effect to that intention, and in this case we think the intention to grant a fee is very clearly to be inferred from the nature of the grant itself.

At the argument upon the bill and answer, the defendants contend that the bill should be dismissed for want of equity, upon the ground that the plaintiffs have not established their title at law, and no case of irreparable injury is disclosed.

The bill alleges that, for many years, something like fifty, four or five families upon the bridge road have been, and still are, supplied with water by the plaintiffs, and those under whom they claim, by means of the pipe laid in this road, for which the plaintiffs and their predecessors have received a yearly rent, and this is substantially admitted by the answer, at least as to some of these families. The bill also alleges that, during all this period of fifty years, the plaintiffs and their predecessors have so used this pipe in said road under a claim of right, and in that way have acquired a valid title to the easement by prescription.

The bill then alleges that the defendants threaten to cut off this pipe and so interrupt the supply of water to these families, to the great and irreparable injury and damage of the plaintiffs, and the occupants of the houses upon the said bridge road.

The bill also alleges that the defendants pretend to have ac-

quired a right to do the acts so threatened by virtue of a quit-claim deed from one Simpson, of the land over which said road runs, but the bill alleges that said Simpson had no right or title to said land.

The answer says that, whether the plaintiffs and their ancestors claimed a right to lay and continue their said pipe in this road, against all persons, they do not know, but they allege they have no such knowledge or belief; and they set up a title to the land by the deed of the heirs of Mr. Simpson, who were entitled to it on the death of Mr. Britton, upon the ground that only an estate for the life of Mr. Britton was conveyed. A copy of Simpson's deed is by agreement made part of the answer, and they allege that no right by prescription was, or could be, acquired against the heirs of said Simpson, or these defendants, during the continuance of the life estate.

And this is the defense set up, namely, a title to the road derived from the heirs of Mr. Simpson, claiming that his deed only gave to Mr. Britton a life estate, but not directly denying the jurisdiction of the Court, or the allegation in the bill that irreparable damage would be caused to the families on the bridge road, and to the plaintiffs by cutting off the pipes.

It may be assumed, then, that, by cutting off the pipe, these families would be deprived of water for their houses, and that the plaintiffs would be injured as alleged in the bill, and it is apparent that the injury would be serious, and in respect to these families, at least, would, in its nature, be irreparable. On the other hand, the restraining of the defendants from cutting this pipe can cause them no injury whatever, and this may properly be considered in many cases in determining whether equity will exercise its summary power.

It is true that the persons occupying these houses are not, formally, parties to this suit; but we think the plaintiffs may fairly be regarded as representing them in this proceeding. They have undertaken to supply them with water; the legal title to the aqueduct is in the plaintiffs; and, although they may not be legally bound to continue the supply of water for any fixed period, still they are interested to do so, and have

provided all the money to accomplish it. If, then, the defendants cut off this aqueduct, they not only deprive these families of water for the time being, but may compel them to seek a supply from other sources, and thus cause a permanent injury to the plaintiffs by diminishing the value of their spring. Looking at it upon a larger scale, where a whole village or city is supplied with water in a similar manner, we should not hesitate to hold the injury caused by destroying the aqueduct used for such supply, as causing an injury which might well be deemed irreparable; nor should we hesitate to decide that the proprietor of the aqueduct might well be regarded as entitled to represent the persons so supplied by him, so far as to maintain a bill in equity to prevent such injury.

Especially would it be so where, as in this case, there had been by such proprietor an uninterrupted use of the aqueduct for many years, and the claim of the other party was to be determined by the legal construction of a deed.

We are of the opinion, therefore, that this objection cannot prevail, and that the plaintiffs are entitled to a decree.

Perpetual injunction decreed.

Nicoll *v.* N. Y. & E. Ry., 12 N. Y. 121. In corporations aggregate the word "successors" is not necessary to create a fee: Cong. Society *v.* Stark, 34 Vt. 243. Otherwise in corporations sole: Overseers *v.* Sears, 22 Pick. 122.

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**So if created by legislative grant.**

**PROPRIETORS, ETC., v. PERMIT,**

Supreme Court of New Hampshire, 1830.

5 N. H. 280.

RICHARDSON, C. J. The question is, whether the defendants have shown a title to the demanded premises? These premises are not within the limits of the township of Enfield, as described in the charter, but are in a gore of land left be-

tween the territory described in the charter of Enfield and the township of Grantham. It can hardly admit a doubt that the gore was left out of the charter of Enfield by mistake. But this mistake cannot be corrected by a court of law. There is no ambiguity, either patent or latent, in the charter, in relation to the southerly line of Enfield. There is nothing on the face of the charter that indicates, in the slightest degree, an intention that the gore should be included in the township of Enfield, and to admit extrinsic proof that sixty-eight degrees were inserted in the charter by mistake, instead of fifty-eight degrees, would be a violation of one of the soundest and best-established rules of evidence: *Jackson v. Bowen*, 1 Caine's Rep. 358; *Jackson v. Sill*, 11 Johns. 201; *Jackson v. Stanley*, 10 Ib. 133; *Jackson v. Hart*, 12 Ib. 77; *Fitzhugh v. Runyon*, 8 Ib. 375; *Jackson v. Wilkinson*, 17 Ib. 146; *Jackson v. Marsh*, 6 Cowen, 281.

Whether a mistake in a charter can be corrected in this Court, in a suit between the State and the proprietors of the township, by virtue of our general jurisdiction, or under the statute of February 6, 1789, which empowers this Court to try all causes touching the validity of grants by the State, and the performance of the conditions in such grants, it is unnecessary to consider in this case, because, however that may be, it is clear such a mistake cannot be corrected in a suit between individuals: *Jackson v. Marsh*, 6 Cowen, 281; *Johnson v. Lawton*, 10 Johns. 23.

It then remains to inquire, whether the said Acts of the Legislature, passed March 28, 1781, and June 18, 1802, have vested in the proprietors of Enfield the gore in which the demanded premises are situated? On this question it seems to us there can be no doubt. Application was made to the Legislature to correct a mistake in the charter of Enfield. It seems not to have been disputed that there was a mistake, and a committee was appointed to correct it. The committee made a report, by which the mistake, with the assent of all concerned, was corrected, and the line of Enfield so established as to include the said gore in that township; and that report is

made by law conclusive between the parties. In those proceedings the State and the proprietors of Enfield and Canaan were clearly parties. The said Acts of the Legislature show conclusively, that the intention was that the gore should be vested in the proprietors of Enfield. There are no particular terms necessary to constitute a grant by the Legislature: *Ward v. Bartholomew*, 6 Pick. 409. Individuals may establish a line between their lands by agreement: *Rockwell v. Adams*, 7 Cowen, 761; *Doe v. Thompson*, 5 Ib. 371; *Jackson v. Talmadge*, 4 Ib. 450; *Jackson v. Smith*, 9 Johns. 100.

And when the Legislature have by statute established a particular line, as the line of a township, the State is estopped to say that the title of the proprietors of the township does not extend to such line. It is clear that a State may be estopped by the Acts of its Legislature: 3 Pick. 224.

But the township of Grantham is described in the charter as bounded on one side by a line running south fifty-eight degrees east by the south line of Enfield; and it is contended that by a well-known rule of construction the line of the town of Enfield, and not the point of compass, is to fix the north line of Grantham. If it appeared that the south line of Enfield was, at the time when the charter of Grantham was made, a known marked line, which had been previously run out and monuments erected to designate it, it would certainly deserve very serious consideration whether the proprietors of Grantham could not hold to such line.

But it does not appear that when the charter of Grantham was made the south line of Enfield had been actually located, and there was then nothing to designate it except the point of compass mentioned in the charter of Enfield. What rule of construction is to apply in such a case it will be time enough to consider when the proprietors of Grantham, or some person claiming under them, shall see fit to raise the question. We are of opinion that the actual location of the township of Enfield by the Legislature is valid against all the rest of the world. It does not appear that the tenant sets up any title under the

proprietors of Grantham, and the non-suit in this case must be set aside.

Rutherford v. Greene's Heirs, 2 Wheat. 196. Nearly all the States have made the word "heir" or "heirs" unnecessary in the creation of a fee-simple estate: 6 Am. & Eng. Encyc. Law, 876; Minn. Gen. Stats. 1878, ch. 40, § 4.

#### INCIDENTS OF A FEE-SIMPLE ESTATE.

Among the inseparable incidents of a fee-simple estate are: The right of alienation; descent according to law; the right of courtesy; the right of dower; and liability for the debts of the owner.

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###### Right of alienation.

Any condition in a deed restricting the grantee's power of alienation of the fee is *void* as repugnant to the grant.

BLACKSTONE BANK v. DAVIS,  
Supreme Judicial Court of Massachusetts, 1838.  
21 Pick. 42.

The defendant claimed title under the following clause in his father's will: "I give to Erastus, my son, the use of the Bartlett farm in Millbury containing about 120 acres. Said farm is not to be subject or liable to conveyance or attachment."

WILDE, J. This is an action of trespass *quare clausum fregit*, and the only question submitted by the facts agreed is the question of title, the breaking and entering of the close by the defendant being admitted. It is not questioned that the devise respecting the Bartlett farm is a good devise to pass the farm to the devisee. By the devise of the profits, use or occupation of land, the land itself is devised. Whether the defendant took an estate in fee or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so

liable, notwithstanding the proviso or condition in the will, the Court cannot entertain a doubt.

A condition in a grant or devise, that the grantee or devisee shall not alienate, is void because repugnant to the estate: Co. Lit. 223 *a*. And so it is as to a condition annexed to a gift or sale of a term for years, or any other chattel real or personal. A condition or proviso to restrain or prohibit the operation of an attachment and levy of an execution, is void for the same reason, and because it is contrary to law, which makes a man's property liable for the payment of his debts. A condition that the grantee or devisee shall not alienate for a particular time or to a particular person or persons, is good. So, in a devise to a minor provided he shall not come into possession, occupy, or have any advantage of the estate during his minority except through his guardian, who is to lease, occupy, and improve the estate, the proviso is good and valid in law: *Smithwick v. Jordan*, 15 Mass. R. 113.

The clause in the devise under consideration is without any limitation, and declares that the property devised shall not be subject to conveyance or attachment perpetually. Such a declaration or provision the testator had no authority to make. It was an attempt to impose a restraint upon property which the law will not allow, and the provision is clearly void.

Defendant defaulted.

*Kepple's Appeal*, 53 Pa. St. 211; *Lovett v. Gillender*, 35 N. Y. 617; *Gleason v. Fayerweather*, 4 Gray, 348. A restriction of all power of alienation for even a single day is void: *Mandlebaum v. McDonell*, 29 Mich. 78.

**Restriction of alienation for a limited time has been upheld.**

**LANGDON v. INGRAM'S GUARDIAN,**  
**Supreme Court of Indiana, 1867.**  
28 Ind. 360.

**GREGORY, J.** Fletcher Ingram's guardian filed a petition to sell the interest of the ward in a part of a lot in the city of Lafayette, for the reason that the property is situated in a part

of the city where there is great danger of the destruction of the buildings by fire; that the property is considered a dangerous risk by the several insurance companies having agencies in the city; so much so, that they refuse to insure a part thereof against loss or damage by fire, and insure the other part at high rates; that in case of the destruction of the buildings, there is no money belonging to the ward with which to rebuild. The only interest the ward has in the property is that derived by the will of his deceased father. That part of the will relating to this property is as follows:

"The residue of my estate, being that situated on said market space, I give and devise to my wife, in trust to manage the same in such way as she may deem most prudent, to rent the same, receive the rents thereof and dispose of them as follows:

"1. To pay all taxes, expenditures for insurance, repairs, rebuilding, or making any changes she may find advisable in said buildings on said realty, or any other outlays on account thereof.

"2. If the other means hereby provided for that purpose shall prove insufficient to pay my debts, as above provided, then said rents to be appropriated to that purpose, till the same shall pay any balance of said debts.

"3. To appropriate to her own use, absolutely, the one-fourth of the residue of said rents, during her natural life; that is, one-fourth of the net income from said realty, after any debts chargeable thereon are paid.

"4. To appropriate to the use of my three children the remaining three-fourths of said net income, one of said fourths to each of them, as follows: One of said fourths to be paid over to my daughter quarterly, or at such other times as received and ascertained; such payment to be to her personally, and on her separate receipt, and neither she alone, or jointly with her husband, to have power to anticipate, charge, encumber, or transfer the same, or any right thereto, or to any part thereof. To use in her discretion the two of said fourths that are given to my two sons, one for the benefit of each, for

the boarding, clothing, and schooling of each, or otherwise, until my youngest son shall arrive at full age; after which time my said wife, in her discretion, may convey to all or any one or two of my said children, by deed, the one-third of said realty, subject to her right to one-fourth of the net income arising therefrom, and said deed shall operate first, to vest a title free from any trust, or any one may convey his or her interest therein to a third party by deed, in which my wife, as such trustee, shall join; but, except as above, my son shall have no power over the same, nor in any mode anticipate, encumber, or transfer the same, or any interest therein, or in said income, while said trust continues. But said trust shall terminate with the death of my wife, and one-third of said realty vest absolutely in each of my said children, unless by deed or will my wife shall direct said trust to be continued, as to the share of any or all of them, and name a trustee or trustees, in which event the same trust created shall continue as to the share of the one or more, as thus directed by my said wife. In the event of the death of any one of my children, not leaving a descendant alive, the share of such one shall continue part of the trust property, the net income therefrom to be equally divided between my wife and the survivors. If a second child die without descendant alive, the share of such one, both original and that taken as the survivor as aforesaid, shall continue part of the trust property, and the net income divided equally between the last survivor and my wife—this to continue during the life of my wife; but the absolute title to each share, original or accruing in said events, to survive to the surviving children or child. If all my children shall die without descendants alive, then the whole property to vest absolutely, in fee simple, in my wife."

The testator left surviving him, his wife and two children—Elizabeth, intermarried with Byron W. Langdon, and Fletcher Ingram, the youngest son, Robert J., having died intestate, without issue, before the death of the testator. The Court below decreed the sale of the ward's interest in the real estate described in the petition. Langdon and wife appeal to this

Court. It is claimed that the restriction on the power of alienation was removed by the death of the youngest son. We do not think so. As a general rule, a condition in a grant or devise that the grantee or devisee shall not alienate is void, because repugnant to the estate, but a condition that the grantee or devisee shall not alienate for a particular time, or to a particular person or persons, is good. So, in a devise to a minor, a proviso that he shall not come into possession, occupy, or have any advantage of the estate during his minority, except through his guardian, who is to lease, occupy, and improve the estate, is good and valid in law: *The Blackstone Bank v. Davis*, 21 Pick. 42.

It was the obvious intention of the testator that the property should remain in the hands of the trustee until the youngest son should arrive at full age, and that the portions of the rents and profits bequeathed to the two minor sons should be applied by the trustee to their support and education. The death of the younger still left a minor son to be supported and educated from the proceeds of the property. We think that, until the surviving minor son shall arrive at full age, the restriction on the power of alienation is valid, and that it is not competent for the guardian to sell the ward's property, under a license from the Common Pleas Court, in violation of this restriction. The nature of the ward's interest in the property, under the will, is such that it cannot be severed without terminating the trust. The trustee must have the control of the entire property to carry out the provisions of the trust. What a Court of Equity would do on the application of the trustee, under the facts stated in the petition, is not involved in this form of proceeding, and we do not wish to be understood as deciding anything on that subject.

The judgment is reversed, with costs, and the cause remanded to said Court, with directions to dismiss the application.

*Simonds v. Simonds*, 3 Met. 558; *McWilliams v. Nisly*, 2 S. & R. 507; *Stewart v. Brady*, 3 Bush. (Ky.) 623; *Hill v. Hill*, 4 Barb. 419; *In re Macleay*, L. R., 20 Eq. 186. *Contra*: A restriction of all power of alienation for even a

single day is void : *Mandlebaum v. McDonell*, 29 Mich. 77. See, also, *DePeyster v. Michael*, 6 N. Y. 467; *Anderson v. Cary*, 36 Ohio St. 506. Restrictions as to person : *Den v. Blackwell*, 15 N. J. L. 386. To sell only to specific persons, void : *McCullough's Heirs v. Gilmore*, 11 Pa. St. 370; 18 Am. Law Reg. 393.

**Restrictions as to use have also been upheld.**

**COWELL v. SPRINGS Co.,  
Supreme Court of the United States, 1879.**

100 U. S. 55.

**MR. JUSTICE FIELD.** In May, 1873, the plaintiff in the Court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was \$250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor ; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterward opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed ; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of

the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character: Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the Court of Appeals of New York in *Plumb v. Tubbs*, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended: 14 Kan. 61. See, also, *Doe v. Keeling*, 1 Mau. & Sel. 95, and *Gray v. Blanchard*, 8 Pick. (Mass.) 283.

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See, also, *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Cornelius v. Ivins*, 2 Dutch. (N. J.) 376; *Ruch v. Rock Island*, 97 U. S. 693.

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negativing the inference that the latter retained any interest in the property or ad-

vanced the purchase-money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust: it did not prevent the legal title from passing by his conveyance: Perry, Trusts, § 334.

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade, and traffic; colonize, organize, and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the Territory of Colorado and to hold and convey real property there. By the law of March 2, 1867, then in force, the Legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits: 14 Stat. 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reason of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations

created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This company was incorporated in 1871 for the purpose of aiding, encouraging, and inviting immigration to the Territory, and to purchase, hold, and dispose of lands, town lots, mineral springs, and other property, also to construct and operate ditches, wagon-roads, and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the Territory which might tend to accomplish the purposes stated. At that time the Legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess, and convey real property in the Territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate

body competent to exercise some of the powers mentioned was created, and under the statute of the Territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the State, succeeding that of the Territory, and the corporation, and is no concern of the defendant. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity: *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 552.

But there is another, and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of this condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it: *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 185; *Miller v. Shackleford*, 4 Dana (Ky.), 287, 288; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

Judgment affirmed.

*Plumb v. Tubbs*, 41 N. Y. 442; *O'Brien v. Wetherell*, 14 Kan. 616; *Gray v. Blanchard*, 8 Pick. 284; *Stines v. Dorman*, 25 Ohio St. 580; *Linzee v. Mixer*, 101 Mass. 512; *Warner v. Bennett*, 31 Conn. 468.

The right of descent, of courtesy and of dower, and liability for debts, are likewise inseparable incidents of a fee simple.

b

**Descent.**

**ESTATE OF DONAHUE,**  
Supreme Court of California, 1868.

36 Cal. 329.

SAWYER, C. J. James Donahue died in Santa Clara County on the 17th of August, 1862, leaving a surviving wife, Mary A. Donahue, and four infant children, Peter Donahue, Margaret Donahue, Mary Jane Donahue, and William E. Donahue. He left a will, by which, after making sundry bequests, he devised one-third of all the residue of his estate, real and personal, to his said wife, and the remaining two-thirds to his said children. On the 6th of August, 1864, one of said children, then an infant, William E. Donahue, died in said county, in the sixth year of his age; and on the 1st of April, 1865, another of said children, Mary Jane Donahue, died in the third year of her age. Letters of administration having been duly issued upon the estate of said infant, William E. Donahue, deceased, such proceedings were had that a final decree of distribution of said estate was made, whereby one undivided third part of said estate was distributed to the surviving brother, Peter Donahue, another equal undivided third to the surviving sister, Margaret Donahue, and the remaining third to the heirs-at-law of the deceased sister, Mary Jane Donahue, to the entire exclusion of the said Mary Ann Donahue, mother of the deceased, who claimed to be entitled, as one of the heirs-at-law of the said William E. Donahue, deceased, to an equal distribution or share of said estate with the surviving brother and sisters. The said Mary Ann Donahue excepted to the decree, and she now appeals therefrom.

The only question is as to whether she is entitled to a share as one of the heirs of the deceased infant son, under our statute of descents and distributions.

Section 1 of said statute, as amended in 1862, provides that, where any person having any estate not otherwise limited by marriage contract, shall die intestate, "it shall descend and be distributed, subject to the payment of his or her debts, in the following manner:

"First— . . . Second— . . . Third—If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister, by right of representation; *provided, that, if he or she shall leave a mother, also, she shall take an equal share with the brothers and sisters.*" Stats. 1862, p. 570.

In this case, the intestate, William E. Donahue, was an infant under six years of age, and he left surviving no issue, wife, or father; but he left a brother, two sisters, and a mother. The case, then, is clearly within the category provided for in this subdivision and its proviso, and by its express terms the estate should have been divided in equal shares between the brother, sisters, and mother, unless there is some other provision affecting the question. We find no other provision applicable to the facts or in any way affecting the question, unless it be the seventh subdivision of the same section, which reads as follows:

"Seventh—If any person shall die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate *that came to the deceased child by inheritance from such deceased parent* shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation." Stats. 1862, p. 570.

And this provision does not affect the question, unless "the estate came to the deceased child [in this instance the intestate, William E. Donahue] by *inheritance* from such deceased parent." Did the estate *devised* by the will of James Donahue, the father of the intestate, come to the latter by "*inheritance*," within the meaning of the statute? We think not. We have no doubt that the term "*inheritance*" is used

in the statute in its ordinary, well-known signification. An estate acquired by inheritance is one that has descended to the heir, and been cast upon him by the single operation of law. "Descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir-at-law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance." 2 Black. Com. 201, and note 1; see, also, 2 Black. Com. 241, 294, 373, 374.

The estate, in this instance, was not cast upon the deceased by operation of law, as the representative and heir of his father, but was conferred upon him by devise. The estate was acquired by *purchase*, in the technical sense of the term, and not by *descent*. It did not come to him by inheritance, and should not, therefore, have been distributed under the *seventh* subdivision of section 1, but under the third, which gives the mother an equal share with the brothers and sisters.

The decree is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

## C

## Courtesy.

WATSON v. WATSON,  
Supreme Court of Errors, Connecticut, 1839.

13 Conn. 83.

WAITE, J. The object of a disclaimer is to prevent an estate *passing* from the grantor to the grantee. It is a formal mode of expressing the grantee's dissent to the conveyance before the title has become vested in him. In some cases it may be highly proper, as where a deed is made conveying an estate to one for life, with a remainder to another in fee. Here, in the absence of all evidence to the contrary, the law would presume the assent of the grantee in remainder, upon delivery

of the deed to the grantee for life, for the benefit of both. But if the remainderman chooses not to take the estate, he may disclaim, and thereby remove all presumption of assent. So, where a deed is executed to several persons, and delivered to one for the benefit of all, if one dissents he may disclaim and furnish evidence that his share still remains in the grantor: *Treadwell et al. v. Bulkley et al.*, 4 Day, 395.

But if the grantee once assents, and the title thereby becomes vested in him, he cannot, by any disclaimer, revest the estate in the grantor. For if he could, the disclaimer would have the effect of a deed, which it cannot have; the object of the latter being to *transfer* property—of the former to *prevent* a transfer.

But in a case of dissent the heir cannot, by any disclaimer, prevent the estate from passing to him. It vests in him *immediately* upon the death of the ancestor; and no act of his is required to perfect his title. He cannot, by any act, cause the estate to remain in the ancestor; for the latter is incapable of holding it after his death. Nor can he, by a disclaimer, transfer the estate to any other person as the heir of the ancestor; for, as has already been observed, the object of a disclaimer is not to *convey* but to *prevent* a conveyance. He is, therefore, in the same situation, upon the death of the ancestor, as a purchaser who has assented to the conveyance. In both cases a transfer can only be made by some instrument adapted to the conveyance of real estate.

A devisee, however, stands in the same situation as a purchaser. If he dissents the estate passes to the heir in the same manner as if no will had been made. It is entirely optional with him to take or refuse the estate devised: *Townson v. Tickell et al.*, 3 Barn. & Ald. 31.

In the present case the disclaimer was made by one who was entitled to the property as tenant by the courtesy. Is he, in this respect, like a grantee or an heir? This species of estate has sometimes been classed with those acquired by purchase. But it is rather an estate thrown upon the tenant by operation of law: Co. Litt. 18 b. It partakes more of the character of an estate acquired by descent than by purchase. Immediately

upon the death of the wife the estate vests in him. Like the heir, he cannot, by refusing to take it, cause it to remain in the wife; nor can he, by a disclaimer, transfer it to others. The estate thus vested in him becomes immediately liable for his debts; and he cannot, by any refusal to take the property, defeat the claims of his creditors.

The disclaimer offered in evidence could have no effect in showing a title in the plaintiffs; and was properly rejected by the Court.

We are, therefore, satisfied that no new trial should be granted.

New trial not to be granted.

d

**Dower.**

**BRACKETT v. LEIGHTON,**  
Supreme Judicial Court of Maine, 1831.  
7 Me. 383.

WESTON, J. If the witness rejected had no interest in the personal estate of the testator, her late husband, she was competent to testify. And this depends upon the true construction of the first clause in the will of the deceased, making provision for her. It is in these words, "it is my will that my beloved wife, Teresa Brackett, shall have, hold, and enjoy her full and reasonable dower in all my estate, according to the laws of this State." Dower is a term well known to the law; and has reference only to real estate. It is also a term of familiar and general use in the community; and we are not aware that it has any popular acceptation, varying from its technical meaning. Indeed dower in an interest so generally known, and so well understood, that there are probably few persons competent to do business, who would be at any loss as to the construction of the term. And we do not feel at liberty to extend its meaning in the will in question. It is possible the

testator might have used it in a larger sense; although whether he did so or not is altogether conjectural. He intended it is said to be generous to his wife; but we have no other evidence of his intentions in this respect, than what appears in this clause in his will. He gives her dower in all his estate, but it was to be according to the laws of the State, which allow it only in lands, tenements, or hereditaments.

After bequeathing \$5 each to the two sons of his former wife, in the third clause of his will, the testator devises and bequeaths all the rest and residue of his estate, real and personal, to his other children. Here the term, personal, is used that his meaning might not be misunderstood, although the word, estate, is a general term, embracing every species of property. Had he used the same terms in the clause providing for his wife, viz., dower in all his real and personal estate, although dower, as applied to the personality, would have been used in an improper sense, yet it might fairly have been understood to carry a third part of his personal estate. But we find him using it in the third clause, and omitting it in the first. He gives her dower in all his estate, according to the laws of the State. The law gives her dower in all his real estate; and we find nothing in the will which warrants the construction that he intended to give her anything more.

The exceptions are accordingly sustained; and there must be a new trial at the bar of this Court.

## e

**A fee simple is liable for the debts of its owner.**

**McCORMICK HARVESTING MACHINE Co. v. GATES,**

Supreme Court of Iowa, 1888.

75 Iowa, 343.

**SEEVERS, C. J.** The plaintiff obtained a judgment against the defendant A. C. Gates, and in this action seeks to subject certain real estate, which said Gates has a title to, or interest

in, to the payment of said judgment. Whatever right or interest A. C. Gates may have in the real estate was derived under the will of E. M. Gates, and it is as follows: "I have placed my son Alvin C. Gates on a farm near Colfax, in said county, described as the southwest quarter and the north half of the southeast quarter of section eleven, township seventy-nine, range twenty-one, situated in said Jasper County, State of Iowa, which it is my will that he occupy and enjoy during his natural life, but without the power or ability to convey or incumber the same, and that its productions and rents are intended by me to insure a support for himself and his family; and it is not my will that he have the power to mortgage or incumber the rents, profits, or productions of said farm, either above or under ground, or that the same be subject to attachment or levy for the debts of said Alvin. It is my will that he have such an estate as will allow of his farming the same himself or renting to others, or as will allow him to mine the coal that is supposed to be under it, or contract with others to mine it, so that nothing is done which will allow the income from the same to escape from the said Alvin or his said family. And it is my will, that upon the decease of said Alvin, the title to said land descend to Glen Gates, daughter of said Alvin, if she is the only child of his then living, or jointly to said Glen and any other child or children that may be born to said Alvin, to share and share alike; and it is my will that if no children of said Alvin are living at the time of his decease, that then and in that case the title in fee simple to vest in my sons, Sumner E. and Lorin A. Gates, and, if they are not living, in their legal representatives." The question to be determined is whether A. C. Gates has such an interest in the land as can be alienated or sold on execution for debts created by him. It is stated in the will that the testator had placed A. C. Gates on the land, and he was to "occupy and enjoy it during his natural life." Conceding that there is no qualifying provision in the will, this is a devise of a life estate: 2 Jarm. Wills (5th Ed.) 404; 2 Washb. Real Prop. (3d Ed.) 450; Reed *v.* Reed, 9 Mass. 372; Blanchard *v.* Brooks, 12 Pick. 63; Lewis *v.*

Palmer, 46 Conn. 460; *Bowman v. Pinkham*, 71 Me. 295. But such devise is coupled with conditions; it being provided that A. C. Gates shall not convey, nor incumber the land or the rents and profits, nor shall the same be subject to attachment or levy for the debts of said A. C. Gates. Counsel for the appellee insist that, as a life estate is vested in A. C. Gates, the provision against the alienation by him or through judicial process is void, because it is inconsistent with the estate vested in him; that is to say, the argument is, if a person is vested with an estate for life or in fee simple of real estate, he must necessarily be vested with the right to alienate such estate, and that such right cannot be in any respect controlled. If the power to alienate is restricted, the estate ceases to be an absolute one, whether it be for life or in fee simple. In this respect there is no difference in the two estates; both are absolute, or neither exists. The authorities, without serious conflict, except as hereafter indicated, are in accord upon this subject, and sustain the views above expressed: 2 Jarm. Wills (5th Ed.) 538; 1 Perry, Trusts, § 386; *Blackstone Bank v. Davis*, 21 Pick. 42; *Deering v. Tucker*, 55 Me. 284; *Keyser's Appeal*, 57 Pa. St. 236; *McCleary v. Ellis*, 54 Iowa, 311. We have doubts whether any adjudged case can be found which holds otherwise, unless the legal title to the property has been vested in a trustee, for the use, under specified conditions, of the beneficiary. Many such cases have been cited by counsel for the appellants, but they are clearly distinguishable, unless it can be said that under the will in question a trust estate was created. But it is too clear for controversy, we think, that a life estate was vested in A. C. Gates. He could not hold such estate in trust for himself. The two estates are inconsistent, and cannot exist in the same person at the same time. In fact, the will does not create a trust estate, but vests an estate for life in A. C. Gates.

The petition states that an execution was issued on the judgment and returned "No property found." This, being admitted by the demurrer, constitutes a sufficient basis for and warrants this proceeding in equity to determine the nature

and extent of the estate of A. C. Gates in the property in controversy. The demurrer was properly overruled, and the judgment of the Court subjecting the life estate to the payment of the judgment must be affirmed.

*Blackstone Bank v. Davis*, 21 Pick. 42.

## 2

### DETERMINABLE FEES.

"Determinable Fee" is a generic term, and includes fee-tail, fee upon condition and fee upon limitation, all of which are freehold estates of inheritance, subject to termination upon the happening or not happening of some uncertain event.

#### a

##### Fee-Tail.

An estate in fee-tail is a freehold estate of inheritance given to a donee and limited either generally or specially to the heirs of his body.

*BUXTON v. INHABITANTS OF UXBRIDGE*,  
Supreme Judicial Court of Massachusetts, 1845.

10 Met. 87.

HUBBARD, J. The clause in the will of Benjamin Buxton, upon the construction of which the case principally depends, is as follows: "And the other half of my estate, both real and personal, I give and dispose of as followeth, viz.: the one-half of all my lands, except the eight acres given to James, to my son John Buxton and the heirs lawfully begotten of his body, and their heirs and assigns, and all the remainder of my movable estate." It is argued that the words "heirs and assigns" must be construed to have some meaning; and that, by giving them their appropriate signification, they enlarge the gift to a fee, and consequently the defendant has no estate in the demanded premises. But we are of opinion that the words do not enlarge the devise. It is a common rule of construction

that general words are to be limited and restrained by the subject to which they immediately relate, and are not to be construed as conferring a larger or different grant or power than the distinct grant or power created by the specific words. In this case, to give the construction contended for, would be directly to change the nature of the estate specifically created, and to defeat the object of the grant. In cases where a subsequent clause is clearly repugnant to preceding clauses, the clause must be rejected as not expressing the intent of the donor or grantor, and as the only legal mode of carrying into effect imperfect instruments. But in the case now before us, we do not think the clause repugnant, nor that the words were intended to enlarge, or that they do enlarge, the estate previously created; but that the clauses may stand together, and that they intend merely to express the nature of the estate, as one of inheritance beyond the immediate heirs of the first taker, and are but a repetition of the gift. The words "heirs and assigns" are qualified and restrained by the words "heirs of the body," which last show clearly the intention of the testator to create an estate tail; and whether the restraining words succeed or precede the more general words, they operate, in either case, to limit the gift or grant, if the intention is clearly expressed by such restraining words; as in *Soulle v. Gerrard*, Cro. Eliz. 525, where Richard Baker, being seized of land in fee, and having four sons, devised his land to his son Richard and his heirs forever, and if he should die within the age of twenty-one years, or without issue, then to his three other sons. The devisor died, and Richard, the donee, had issue, a daughter, and died within age; and it was adjudged that he took an estate tail, and that the daughter was entitled to the estate. So in *Clache's Case*, Dyer, 330 b, where a grant to A. and her heirs forever was restrained by the subsequent words, "having no issue." See, also, *Corbin v. Healy*, 20 Pick. 514, where one Marcy executed a deed to his daughter Rhoda. The words were, "unto the said Rhoda, and to her heirs born of her body, to be to her and them forever;" and afterward, in the *habendum*, were the words "to

have and to hold the same to her and her heirs forever." The grantor also covenanted with her, and her heirs as aforesaid, that he would "warrant and defend the same to her and her heirs aforesaid." In that case the Court held that the words in the *habendum* did not enlarge the estate to a fee simple, but that the generality of the word "heirs," in the *habendum*, was limited to those heirs who by law could take that estate, namely, heirs of her body. See, also, Co. Lit. 21 *a*; Perk., §§ 170, 171; Osborne *v.* Shrieve, 3 Mason, 391.

This disposes also of the second point raised, to wit, that if there was an estate tail in the first taker, the fee vested in the heirs of Timothy, and that his eldest son did not take the estate as tenant in tail, and so the defendant, though an heir and the eldest son of Timothy, would only be entitled to one-tenth part of the estate. Upon the authorities above cited it is clear that the estate was not enlarged in the heir of the tenant in tail, by the subsequent words, and consequently the eldest son of John took an estate tail, and not an estate in fee; and under him the defendant claims as heir in tail.

We are now called upon to consider the construction to be given to the deed of partition between the two brothers, John and James Buxton, made shortly after the death of their father. And the question is, whether the legal effect of this partition was to give John Buxton an estate tail in the whole of the lands set off to him in severalty, and to James Buxton an estate in fee in the portion set off to him; or, admitting that it would not bind the heir of the tenant in tail, if he chose to avoid it after the death of the tenant in tail, yet if he now comes in and affirms the partition, whether he cannot establish it, and thereby entitle himself to claim the whole of the demanded premises.

This partition was not made under any legal process, but was the mere agreement of the parties; and it is very clear, we think, that it could not bind nor affect the heir in tail, though it would be binding on the tenant in tail during his life: Co. Lit. 170 *a*, 173 *b*; Soule *v.* Soule, 5 Mass. 64. And although such a division of the estate might be a reasonable

and fair one, yet the legal power was wanting to carry into effect their intent in its full extent. The deed itself, however, was not a simple partition during the life of the tenant in tail, because James, who was seized in fee of an undivided half of the estate, by force of the partition deed, conveyed an estate in fee to John and his heirs, in half the premises assigned and transferred to John in said deed, while he, in return, took an estate for life in half the premises released and conveyed to him by John, who had no right or power to pass a larger estate. We are therefore of opinion that, by the deed of John Buxton to Nicholas Batty, an estate in fee passed to him in an undivided half of the premises conveyed to him, and an estate of freehold, during the life of John, in the other undivided half. This deed was made so long ago as January, 1789, but John Buxton not dying till 1839, the right of the heir in tail has not been affected by the lapse of time, although Batty's estate has passed to other persons, under whom the tenants claim.

Whether the heir in tail could have affirmed the partition after the death of the tenant in tail, if he had made no conveyance during his lifetime, we are not called upon to consider, because, after the transfer to Batty, other persons acquired rights in the lands, which could not be affected by any election of the heir in tail to affirm the partition.

With these views, we are of opinion that the defendant has established his title to one-half of the demanded premises; and his remedy, if he has any, for his further interests in the lands devised in tail, must be pursued against the other owners of the entailed estate.

Judgment is to be entered on the verdict for an undivided moiety of the demanded premises.

WILLIAMS, R. P. 35; 4 Kent Comm. 11. A "conditional fee" is the same as a fee-tail: *Wight v. Thayer*, 1 Gray, 284; *Steel v. Cook*, 1 Met. 281. To create a fee-tail the word "body" or other words of like import was necessary: *Baker v. Scott*, 62 Ill. 86. General and special fee-tail: *Butler v. Huestis*, 68 Ill. 594. Incidents to fee-tail: *Boone*, R. P. 31. See further: *Allyn v. Mather*, 9 Conn. 114; *Jewell v. Warner*, 35 N. H. 176; *Redstrake v. Townsend*, 39 N. J. L. 379. Abolished in Minnesota: Minn. Gen. Stats. 1878, ch. 45, §§ 3, 4.

b

**Estates upon Condition.**

An estate upon condition is a freehold estate "which may be created, enlarged or defeated upon the happening or not happening of some uncertain event."—2 Washb. R. P. 2.

WARNER v. BENNETT,

Supreme Court of Errors, Connecticut, 1863.

31 Conn. 468.

SANFORD, J. In our opinion the conveyance from Tomlinson to Bennett and others was of a fee-simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs and assigns forever, for certain uses specified in the deed, which contains the following clause: "The *conditions* of the within deed are such that whenever the within-named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever except such as are described in said within deed, the said grantees forfeit the right herein conveyed to the within-described premises, upon the grantor paying to the said Hatch and Bennett and other stockholders the appraised value of such buildings as may be thereon standing."

Blackstone says, estates upon condition "are such whose existence depend upon the happening or not happening of some uncertain event whereby the estate may be originally created or enlarged, or finally defeated:" 2 Bla. Com. 151. Littleton says, "it is called an estate upon condition because that the estate of the feoffee is *defeasible* if the condition be not performed:" § 325. "A condition is created by inserting the very word 'condition' or 'on condition' in the agreement:" 1 Bouvier's Inst. 285. Conditions are precedent or subsequent. "Precedent are such as must happen or be performed before the estate can vest or be enlarged. Subsequent are such by the failure or non-performance of which an estate already

vested *may be defeated*:" 2 Bla. Com. 154. In the case of a condition "the estate or thing is given absolutely without limitation, *but the title is subject to be divested* by the happening or not happening of an uncertain event. Where on the contrary the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation:" 2 Bouvier's Inst. 275; 2 Bla. Com. 155.

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not *until* they should convert the property to other uses than those specified in the deed, nor *so long as* they should continue to use it for the purposes specified, but forever; with a proviso or condition expressed in the deed, that if they should convert the property to other uses they should *forfeit* their estate. The words employed are most appropriate and apt to make an express condition in deed. They are "*the conditions of the within deed are such*," etc. And in Mary Portington's Case, 10 Coke, 41 a, it is said that "*express words of condition shall not be taken for a limitation*." It has indeed been held that they may be so taken where the estate is limited over to a third person upon the breach or non-performance of the condition (Lady Anne Fry's Case, 1 Inst. 202), but there is no such limitation over in the case before us. So when it is said that "*whenever the within-named premises shall be converted to any other use*," etc., "*the grantees forfeit the right herein conveyed*," it is clearly indicated that the estate thus forfeited by the misappropriation is to be cut off before the time originally contemplated for its termination by the parties.

But it is said that by the terms of the instrument the forfeiture depends not merely upon the misappropriation of the property by the grantees, but also upon the grantor's payment of the appraised value of the building. Suppose it is so, how can that affect the question whether this is a condition in deed or a limitation? No matter how many events the forfeiture

depends upon, nor how many individuals must act in producing them, when all those events concur and co-exist the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual. But the payment for the building was not an event upon which the forfeiture depended. It was merely a duty imposed upon the grantor by the contract in addition to that which the law imposed, to enable him to take advantage of the breach of condition and enforce the forfeiture. His legal obligation to enter for breach of the condition was in no wise affected by it. The estate conveyed by the deed was not an easement, or any other right or interest in the property less than a fee simple. The fact that the instrument was signed by both of the parties to it is of no importance. They were neither more nor less bound by the stipulations and conditions contained therein by reason of such signature. The instrument contains no contract on the part of the grantor to pay for the building. The provision upon that subject operates as a qualification of the grantor's right to enforce the forfeiture and regain his property, but operates in no other way. But for that provision the estate granted could have been put an end to, and revested in the grantor, by an entry only; under that provision an entry could be made *available* only by payment for the building also.

We think it clear that the estate of the grantees was an estate on condition in deed, and that it was an estate upon condition subsequent; and hence, notwithstanding a breach of the condition by reason of which the estate might have been defeated, it must continue to exist in the grantees, with all its original qualities and incidents, until the grantor or his heirs by an entry (or its equivalent, a continual claim) have manifested in the way required by law, their determination to take advantage of the breach of condition, to avail themselves of their legal rights, and to reclaim the estate thus forfeited.

The law upon this point is thus laid down by Professor Washburn, in the first volume of his treatise on real property, page 450, with accuracy and precision: "A condition, how-

ever, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original qualities or incidents." See also Ib. 452; 2 Bla. Com. 155; 2 Cruise Dig. 42.

But there is in this bill no allegation that an entry for condition broken was ever made. No right to maintain this suit is disclosed, no title to the property is set up, nothing is claimed but a right of entry for condition broken. And for this reason, if for no other, the bill is insufficient, and the decree must be pronounced erroneous.

The allegation in relation to an abandonment of the property is immaterial. It is not averred that the grantees had abandoned the property, but only that they had abandoned it "so far as the uses named in said deed are concerned;" that is, that they had ceased to use the property for the purposes for which the grant was made, not that they had ceased to use it altogether. What effect an absolute and entire abandonment of the property by the grantees would have had upon the legal or equitable rights of this petitioner, we are not now called upon to decide.

Secondly. A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so: 2 Cruise Dig. 4; 4 Ib. 113; 1 Spence Eq. 153; 1 Swift Dig. 93. The grantor or his heirs only can enter for breach of such condition: 1 Washb. on Real Prop. 451; 2 Cruise Dig. 44. The petitioner therefore could have obtained no right or title to make an entry for breach of the condition, and without such entry the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property.

Thirdly. If there was a breach of the condition and a forfeiture of the grantees' estate in consequence, and if a right of entry could be and was in fact assigned to the petitioner, still the petitioner could not obtain the relief for which he seeks in a Court of Equity, because that Court never lends its aid to

enforce à forfeiture: 4 Kent Com. 130; 2 Story Eq. Jur., § 1319; *Livingston v. Tompkins*, 4 Johns. Ch. 415.

Lastly. If the right, title, or interest, whatever it was, of the grantor or his heirs was assignable, and was assigned to and vested in the petitioner, as he claims, he had no occasion to come into a Court of Equity for relief. We do not see why he might not have entered for breach of the conditions, requested the respondent to unite with him in procuring an appraisal of the building, if he refused procured such appraisal without the respondent's co-operation, tendered the amount of the appraisal, and brought his action of ejectment. The petitioner's legal right, if he had it, to put an end to the grantee's estate and obtain possession of the property, we think could not have been defeated by the respondent's refusal to co-operate in the appraisal or accept the tender. See 1 Swift Dig. 295; Powell on Cont. 417; *Whitney v. Brooklyn*, 2 Conn. 406. We know of no power in a Court of Equity to compel the respondent to join the petitioner in procuring an appraisal, nor to make one, in such a case as this; and we see no occasion for the exercise of such a power if it exists. We think the petitioner has an adequate remedy for the enforcement and protection of all his rights at law.

There is manifest error in this record.

4 Kent Comm. 9; 2 Devlin on Deeds, 974; *Osgood v. Abbott*, 58 Maine, 73; *Southard v. Central Ry. Co.*, 26 N. J. L. 1; *Bowen v. Bowen*, 18 Conn. 535; *Hooper v. Cummings*, 45 Maine, 359; *Delhi School District v. Everett*, 52 Mich. 314; *State v. Brown*, 27 N. J. L. 13, 20; *Cook v. Bisbee*, 18 Pick. 527; *Arms v. Burt*, 1 Vt. 303; *McKelway v. Seymour*, 29 N. J. L. 321, 329. Only the grantor or his heirs can take advantage of the condition broken: *Southard v. Central Ry. Co.*, 26 N. J. L. 1.

## C

**Estates upon Limitation.**

**An estate upon limitation is a freehold estate of inheritance "liable to be terminated *ipso facto* by the happening of the event by which the limitation is measured."—1 Washb. R. P. 94.**

**HENDERSON v. HUNTER,**  
**Supreme Court of Pennsylvania, 1868.**

59 Pa. St. 335.

Where land is conveyed to the grantees for church purposes, "so long as they use it for that purpose and no longer, and then to revert to the original owner," an estate upon limitation is created in the grantees with a conditional limitation in the grantor.

**AGNEW, J.** This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitations of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers of the said church at their General Conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany

the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed, and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on Executory Interests, p. 12, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "if," "whilst" and "during," as when land is granted to one *so long* as he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents he shall have made £500: 2 Black. Com. 155; Smith on Exec. Int. 12; Thomas Coke, 2 vol., 120-21; Fearne on Rem. 12, 13 and note p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action,

hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the General Conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according to the rules and discipline then existing ; for a mere temporary suspension of services there, or a discontinuance of the use without authority, would not, *ipso facto*, determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential.

According to the constitution and discipline of the Methodist Episcopal Church of the United States, its preachers, denominated deacons and elders, are not called by the societies to which they preach, but are appointed to stations, and to travel in circuits, by the presiding bishop of the annual conference. The power is lodged in him, but from a practical necessity he acts with the advice of his council of presiding elders assembled at the annual conference. The government of the church is clerical and not lay. It has no admixture of the laity, excepting in the quarterly conference of the circuit or station, in which certain lay official members are admitted to seats *ex necessitate rei*. The annual conferences are composed of the deacons and elders in the traveling ministry within the respective conferences, presided over by a bishop or superintendent, as originally termed, assigned to hold the conference by the board of bishops. The general conference consists of delegates, elected by all the annual conferences from among the traveling preachers, presided over by the bishops in turn, and holding its sessions quadriennially.

The annual conferences are divided into districts, composed of the circuits and stations within their respective boundaries. Over each district the bishop, at the annual conference, appoints an elder to preside, who travels his district four times a year, and presides at the quarterly conferences in each circuit or station, composed of the traveling and local preachers, exhorters, stewards, class leaders, trustees, and first male superintendent of Sunday-schools. A station has a single place of

stated public service, while a circuit has several. It is to these circuits and stations the traveling preachers are assigned at every annual conference. In his circuit or station the preacher in charge arranges or "plans" the appointments of service during the term of his own appointment. In planning the circuit he *may* take the advice of the stewards, if he choose to ask it; and in arranging the appointments for service it is his duty to give the local preachers within his charge regular and systematic employment on the Sabbath.

No specific directions are found in the discipline as to the arrangement of the appointments, and the whole subject seems in a great measure committed to the sound discretion of the traveling preacher in charge, subject only to the discipline duty of preaching where there is the greatest number of quiet, willing hearers, the most fruit, and where the Spirit most abounds; and subject to the superintending control of the presiding elder, whose duty it is to oversee the spiritual and temporal business of the church; to take charge of all elders and deacons in his district, and to take care that the discipline shall be enforced in his district.

As to the particular building or house in which services shall be stately held, there is nothing definite in the discipline, and the authority over it seems to be only inferential, arising out of the power of the preacher in charge to arrange the appointments of service, which must include places as well as times of appointment. This vagueness probably flows from the fact that at just this point the boundary of church polity interlocks with the lines of popular support, for money and members must come from the laity. Still church polity reserves a large share of control over church property, as will be seen in the chapter on this subject; with a sorrowful recognition, however, of its dependence, for plainness and economy in the building of churches is enjoined, lest the necessity of raising money make rich men necessary to the church, and if so (says the discipline), "we must be dependent on them, yea, governed by them, and then farewell to Methodist discipline, if not doctrine, too."

In order to preserve control, however, it is made the duty of the quarterly conferences to secure the ground on which churches are to be built according to the deed of settlement, and to admit no charter or deed that does not secure the rights of the preachers of the church in the ministration of its services according to the true meaning of the deed of settlement, the form of which is prescribed.

Thus the effect of this active control of the clerical authorities of the church over preachers, preaching, and church property, is to take from the society at large, or laity, the power of continuing any building as a place of worship according to the rules and discipline of this church, after the ecclesiastical authority has resolved to discontinue the services of its preachers there. The society might choose to worship there of their own head, and call a preacher of their choice who was willing to come without the authority of his church, but in doing so they would cut them themselves off from their church connection, and would be worshiping there no longer as members of this church under its rules and discipline; for to worship as members and under the discipline they must accept the traveling preacher sent to them by the bishop. Consequently, the trust in this case ceased when the proper church authorities, acting under and according to the rules and discipline, totally abandoned the building as a place of worship for the members of this church.

The fact of such an abandonment was submitted by the Judge and found by the jury. In his charge the learned Judge submitted the question on the testimony of the presiding elder and the book of discipline as to the authority for so doing; and on his testimony and that of others as to the actual discontinuance of services there, and the causes thereof. This was all he could do, as the question of fact belonged to the jury.

The reverend gentleman had testified that the church had been abandoned by the conference in March, 1867, and that this action having been taken by the bishop and his council of presiding elders, and the preaching removed to the school-

house in the village, any preaching in this building after the conference, was without the sanction or authority of the church.

I must say I have not discovered in the discipline the precise ground of the bishop's authority to do this; yet it may be a proper understanding of his authority as gathered from the entire body of church law, and the rule in the civil Court is that the churches are left to speak for themselves in matters of discipline and doctrine: *German Reformed Church v. Commonwealth*, 3 Barr, 282. But however the fact may be, where the precise power is lodged, certain it is in this case this proof was made, and with it the fact that the abandonment of the building had also the express sanction of the presiding elder, and inferentially the sanction of the preacher in charge.

We cannot say, therefore, that the fact of abandonment was submitted without sufficient evidence. The fact being found by the jury, these plaintiffs—at the time of the removal of the building—were no longer trustees of the property by the very terms of the limitation in the deed, and had no ownership or estate to enable them to maintain this action.

This is sufficient for the purposes of this case. But it is also insisted that these trustees were superseded by the election of new trustees by the quarterly conference under a new rule adopted by the General Conference of 1864. We shall express no opinion on this point, the interest depending on the form of the deeds made previous to 1864, being too important to be determined upon a meagre presentation of the case to us. It is proper, however, to suggest to the church authorities that this is perhaps perilous ground to stand upon. The church may provide a new mode for the election of trustees, and make their deeds hereafter conform to this mode. But when it comes to the right to supplant trustees established by contract, or to fill vacancies in a mode differing from the terms of the contract, which are the laws of the trust, a new question arises.

A deed is a contract *inter partes*, the grantor on one side and

the trustees on the other, and even the Legislature cannot impair the contract. If conflicts should arise between the trustees nominated or provided for in the deed and those appointed by the quarterly conferences, it may be found difficult to overthrow the will of the grantor or first party in the deed expressed in this contract form.

Judgment affirmed.

d

**When a condition subsequent is followed by a limitation over in case of a breach of the condition, it becomes a conditional limitation.**

STEARNS v. GODFREY,  
Supreme Judicial Court of Maine, 1839.

16 Me. 158.

WESTON, C. J. Until March 25, 1786, the title to the land in controversy was in the Commonwealth of Massachusetts. On that day, it was included in a large tract granted and conveyed, by a committee in behalf of the Commonwealth, to John Brewer and Simeon Fowler, and certain settlers on the tract, mentioned by name as grantees in the deed, among whom are Hannah Ary, widow, and Solomon Sweat. The deed contained the following clause in respect to these settlers, "on condition that each of the grantees aforesaid pay to John Brewer and Simeon Fowler, five pounds in lawful money, within one year from this time, with interest till paid." Taking the deed together, we must regard it as conveying to each of the settlers named, one hundred acres of the land, subject to be defeated upon the non-performance of the foregoing condition, within the year. Generally an entry of the grantor or his heirs is necessary to defeat an estate thus granted, upon condition subsequent; and the estate could not be divested by the entry of a stranger. But the deed contained a further clause, which is in these words, "provided nevertheless, if any settler, or other grantee aforesaid, shall neglect to pay his proportion of the sum or sums aforesaid, to be by him paid, in order to entitle him to

one hundred acres as aforesaid, in that case the said John Brewer and Simeon Fowler shall be entitled to hold the same in fee, which such negligent person might have held, by complying with the condition aforesaid on his part."

It is a rule of law, that if a condition subsequent is followed by a limitation over, in case the condition is not fulfilled, or there is a breach of it, that is termed a conditional limitation: 2 Black. 155; 4 Kent, 121; *Pells v. Brown, Croke James*, 590. This limitation takes effect without entry or claim, and no act is necessary to vest the estate in the party to whom it is limited. The land then was conveyed to the settlers named, with a conditional limitation over to Brewer and Fowler, if they or either of them, failed to fulfill the condition, within the time appointed. There was a failure on the part of the settlers; whereupon at the end of the year, in March, 1787, the fee of the land in question vested in Brewer and Fowler. The settlers having petitioned the Legislature to interfere in their behalf, a resolve was passed on the 24th of February, 1791, proposing, that if Brewer and Fowler would quiet the settlers for a less sum than they were originally to receive, the difference should be made up by the Commonwealth. The rights of Brewer and Fowler were recognized in that resolve which, having become vested, were out of the reach of legislative control. The settlers were treated with indulgence, both by the Commonwealth and by Brewer and Fowler, who discovered no unwillingness to accede to the proposition made to them.

On the 20th of December, 1794, one Ames and his wife, the same who had been the widow Ary, conveyed their title to the Ary lot to Nathaniel Gould, the elder. Although the legal title to the land was in Brewer and Fowler; yet as they were willing to release their right to the settlers, upon the payment of a small sum, the beneficial interest was regarded as in the latter. It does not appear that Gould resisted or denied the title of Brewer and Fowler, while it remained in them, and the jury have found, that they were not disseised by Gould.

In consequence of the mistake of Nathaniel Dummer, who acted under the resolve of March 1, 1799, Gould's lot was as-

signed to Solomon Sweat, and Sweat's lot to Gould. In February, 1804, they both accepted from Brewer and Fowler deeds of each other's lots, having paid to them the sums stipulated. Whether Dummer had authority thus to locate to each his lot, or whether what he did was binding upon them, if they had refused to acquiesce, it is not necessary to decide, as the parties concerned were satisfied to abide by the arrangement.

Up to this period there is nothing in the case, except perhaps the mortgage to Neal, tending to show that Gould claimed adversely to Brewer and Fowler, but that he held in subordination to their title. He witnessed the deed of his lot to Sweat, of the contents of which he could not be supposed to be ignorant, as he himself received a deed of Sweat's lot. They must have been given at their instance, and upon payment of money. Gould set up no adverse seisin, and interposed no objection, so that as far as he was concerned, there was nothing to prevent the operation of the deed to Sweat. As he still occupied the land, he must be considered as holding as Sweat's tenant at will, and subject to the duties of that relation. It is true he violated those duties, by a conveyance of the land in fee to Neal, in July, 1806. This, at the election of Sweat, might have been treated as a disseisin. But Gould remained in as before, recognizing Sweat's title; for in 1810, he requested him to convey to John Wilkins, he himself conveying the land, of which he had taken a deed to Sweat. From July, 1806, Gould, the elder, may have professed to Neal and his agent, that he held under him; and as between them, Gould was Neal's tenant at will; but he previously stood in the same relation to Sweat, who had prior claims to his fidelity as tenant. Unless Sweat elected to consider himself disseised, for the sake of his remedy, he had a right still to treat Gould as his tenant. In the conflict of duties, which Gould assumed, he was doubtless playing a double game for his own purposes; and there is much reason to believe that his object was to defraud Neal. But there is no evidence that the tenant had any notice of it, or that it is in any degree imputable to him. He is entitled to stand upon his rights; and if by the rules of law, the title

is in him, it must be so adjudged. If the title of Neal is not to be traced back to a period anterior to July, 1806, the seisin and the fee were then in Sweat. He could not be disseised by his own tenant, Gould, except at his election: *Blunden v. Bangle*, Cro. Charles, 302. If there was no disseisin, the tenant has connected himself with Sweat's title, and must prevail.

It may be insisted, that Neal's title commenced when the mortgage deed was executed to him by Gould, in 1797, and that he then succeeded to Gould's seisin. If so, Gould could do nothing in 1804 or subsequently to impair Neal's right. It is not improbable, that the justice of the case, in some of its aspects, might be best promoted by sustaining these positions, if they were in accordance with the facts. The fraudulent practices of the elder Gould would thereby be defeated, and the heirs and assigns of Neal would enjoy the fruits of his purchase. But the rights of other persons, not conusant of the fraud, if any existed, have intervened; and if it has appeared that Neal has waived an advantage he might have retained, his heirs and assigns must abide the consequences. In July, 1806, he cancelled his mortgage, and took a new conveyance from Gould. The mortgage having been discharged; no rights can be predicated upon it, or deduced from it. Intervening incumbrances or attachments, if any had existed, would thereby have been let in. Neal could not have set up prior rights, arising from the cancelled mortgage. We cannot regard it as having any more effect upon the cause than if it had never existed. If Neal would have preserved his title under the mortgage, he should have refused to discharge it without payment, and declined the arrangement proposed by Gould.

As the lot in question vested in Brewer and Fowler, in March, 1787, the instruction first requested was properly withheld, as were also the second and third, the jury having negatived the facts upon which they were based. The jury were instructed that the title did not pass to the widow Ary by the deed to Brewer, Fowler, and others, but as it passed to Brewer and Fowler, at the end of a year, viz., in March, 1787, by a conditional limitation, the legal effect was the same as if it had

never vested in the widow Ary, so that the tenants were not unfavorably affected by this instruction. The other instructions given to the jury were substantially correct.

Judgment on the verdict.

4 Kent Comm. 9; Tiedeman, R. P. 281; Boone, R. P. 214; 2 Devlin on Deeds, 974; Fifty Associates *v.* Howland, 11 Met. 99; Owen *v.* Field, 102 Mass. 90; Proprietors *v.* Grant, 3 Gray, 142; Miller *v.* Levi, 44 N. Y. 489. A stranger may take advantage of a limitation: Owen *v.* Field, *supra*.

e

**Created by Will.**

**Estates upon condition and limitation may be created by will.**

**WHEELER *v.* WALKER,**  
Supreme Court of Errors, Connecticut, 1817.

2 Conn. 196.

HOSMER, J. It is difficult to conceive a case more free from controversy than this, whether we regard the manifest intention of the testator, or the uniformity of precedent.

The devisor, after having made certain devises, gives to his sons, David and Nathan, "all the rest and residue of his estate, real and personal, they paying to his two daughters, Patience Wheeler and Ann Wheeler, each \$300, within one year after his decease." The money was not paid. The plaintiffs enter for non-payment; and bring ejectment to recover the possession.

It was argued for the defendant that the sum bequeathed was a mere legacy, or trust, to be enforced in chancery only. To this the reply made is conclusive, that it is more than a legacy or trust; it is a devise on condition, by the non-performance of which, the plaintiff Ann, one of the heirs of the devisor, has right of entry on the land devised.

An estate on condition expressed in the grant or devise itself, is, where the estate granted has a qualification annexed, whereby the estate shall commence, be enlarged, or defeated, upon performance or breach of such qualification or condition: 2 Black. Comm. 154; Co. Litt. 201. Estates on condition sub-

sequent are defeasible, if the condition be not *strictly* performed : 2 Black. Comm. 154.

The words which constitute a condition may be various. "In particular words there is no magic ;" their operation depends on the sense which they carry : 1 Ves. 147. What, in this case, was the intention of the devisor is the decisive question. Was it his purpose to invest his sons with an estate defeasible on a condition which would effectually coerce the payment of the money bequeathed to his daughters ; or did he intend to leave them destitute of *legal remedy* to vindicate their undoubted rights ? A construction of the devise, according to the usual signification of language, and duly regarding the subject-matter and the consequences will leave no doubt on the mind.

Land granted to a person *on condition*, or *provided always*, or *if it shall so happen*, or *so that* he pay to another a specific sum, within a specified time, vests in him a conditional estate ; and if he does not punctually make payment of the money, his estate has become voidable by entry : Co. Litt. 203 a. From the case of Crickmere v. Paterson, adjudged in the 30th of Elizabeth, Co. Litt. 236, b., Cro. Eliz. 146, it appears, that the words *to pay*, in a will have been considered as constituting a condition. That case was this : A man seised of certain lands, holden in socage, had issue two daughters A. and B., and devised all his lands to A. and her heirs, *to pay* unto B. a certain sum of money at a certain day and place. The money was not paid ; and it was adjudged that these words, "*to pay*," etc., did amount in a will to a condition ; and the reason was, for that the land was devised to A. for that purpose ; otherwise B., to whom the money was appointed to be paid *would be remediless* ; and the lessee of B., upon an actual ejectment, recovered the moiety of the land against A. The words, *to pay*, in the preceding case, are precisely equivalent to the word *paying* in the one before the Court. In Boraston's Case, 3 Co. 21 ; Mary Portington's Case, 10 Co. 41 ; Wellock v. Hammond, Cro. Eliz. 204, and Fox v. Carlyne, Cro. Eliz. 454, the word *paying*, in a will, was considered as creating a condition, or limitation, as should best effectuate the intent of the testator. In the case of Crickmere

*v.* Paterson, the words "*to pay*," etc., were decided to import *a condition*, and this construction gave a sufficient remedy. But, in Wellock *v.* Hammond, the expression, "paying forty shillings to each of his brothers and sisters" was adjudged a limitation; for if it were considered *a condition*, there was, in that case, no remedy for the money. And in Mary Portington's Case, it is said, "this word *paying*, shall amount to a limitation in a will by construction, because in law it is not any word, either of condition, or limitation; and, therefore, in a will, it shall serve, *as well for the one, as for the other, to supply the intent of the devisor.*"

The meaning of the expression, in Crickmere's Case, "otherwise B., to whom the money was appointed to be paid, would be remediless," has been quite misconceived. The idea communicated, undoubtedly, is this, that *under the devise* there was no other *legal remedy*. It is of no avail in this construction of the devise that chancery may give redress, or that the donee has engaged to make payment. The Court neither refer to the remedy which a Court of Equity may impart, nor to any future possibilities: for the exposition given is a sufficient reason that *the law* gave no other redress by virtue of the devise, for the coercion of payment, than by construing the words to import *a condition*. This effectuated the intent of the testator. The same observations are equally applicable to the case before the Court. To expound the devise, as bequeathing a legacy, or subjecting the donees to a trust, deprives the daughters of all *redress at law*; and this is a decisive reason for considering the words as importing a condition.

To enter at greater length into a consideration of the question, whether the devise creates a condition or limitation can be of no importance. On either exposition, the remedy of the plaintiffs is the same. It is, however, very apparent that to consider the words as importing a condition is all that is requisite to secure the rights of the plaintiffs under the devise; and this, decisively, settles the construction.

Judgment to be given for the plaintiffs.

## B

## FREEHOLD ESTATES NOT OF INHERITANCE.

A life estate is a freehold estate, not of inheritance, which is to continue for the life or lives of some particular person or persons, or until the happening or not happening of some uncertain event.

## 1

## CONVENTIONAL LIFE ESTATES.

## a

## Created by Deed.

A life estate may be created by the express words of the parties.

RICHARDSON *v.* YORK,  
Supreme Judicial Court of Maine, 1837.  
14 Me. 216.

Isaac York conveyed lands to his son Joseph with the following reservation in the deed: "Reserving to myself the use and control of the above-described lands during my natural life." Joseph York afterward sold the lands to the plaintiff, and Isaac York remaining in possession cut a large quantity of timber and was taking it to the banks of the Saco River, intending to appropriate the proceeds to his own support, when the plaintiff replevied the timber on the ground that the life-tenant had no interest or title to the timber.

EMERY, J. The great question in this case is whether the logs replevied are the property of the plaintiff, so as to draw to him the right of maintaining the action. For it is certain, he could not rightfully have entered to cut them himself without the assent of Isaac York, one of the defendants.

In the language of HEATH, J., in Attersoll *v.* Stevens, 1 Taunt. 183, at p. 198, it is stated, as common learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed. If a general or a partial permission be given to the lessee in the instrument creating the estate, to commit waste, he is so far a tenant with-

out impeachment of waste. Such a permission vests the property of what is the subject of waste, in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals.

From the statement of facts we learn that the land conveyed by Isaac York to Joseph York, on which the trees were cut, consisted of about thirty-five acres, from fifteen to twenty acres of which is partially wooded, the residue consists of mowing and pasture, about five acres of that mowing is interval, and of a good quality; and the income of the land is insufficient for the support of said Isaac; and that said Isaac has not sufficient income from every source for his comfortable support; that he intended to apply the proceeds of the sale of the logs to his own support, and that if so applied, it would not have been more than a comfortable provision thereunto; that the house occupied by said Isaac was, and is, greatly out of repair, as well as the fences; that the said Isaac is very poor, nearly eighty years of age, and very decrepit.

In no part of the statement of facts, or in the deeds, is it made known whether this was an arrangement made by father and son for the support and maintenance of the father, though it is strongly to be suspected.

The deed of Isaac York, dated the 14th October, 1831, conveys to Joseph York "the northwest half of the homestead farm, whereon I now live, reserving to myself the use and control of the above-described lands, during my natural life." The deed of Joseph York to the plaintiff, dated 24th November, 1834, for \$175, sells and conveys to him all the pine trees and hemlock trees standing, growing, and being on the northwest half of the homestead farm on which Isaac York, now of Standish, in the county of Cumberland, lives, with license to go on and cut and carry away the same; the said northwest half, being the same land described in a deed of Isaac York to Joseph York, dated October 14, 1831, reserving so much of said trees and timber for the benefit of Isaac York, who has a life estate in the premises, as shall be necessary, convenient, and indispensable to the enjoyment of the premises aforesaid

during his lifetime, the quantity reserved and to be left as aforesaid, to be ascertained and designated by Isaac Spring.

In Paget's Case, 5 Coke's Rep. 77, it was resolved that when trees are cut down by tenant for life, the property thereof belongeth to him in remainder in fee.

Afterward, and contrary to the adjudication in Herlaken-den's Case, 4 Coke's Rep. 62, it was adjudged by all the Judges in the King's Bench, 11 Coke's Rep. 79, in Lewis Bowles' Case, which was trover and conversion, that the lessee without impeachment of waste shall have trees which he cuts, for without impeachment of waste, is as much as without demand for waste done; otherwise, it is, if it be without impeachment, etc., by writ of waste. It was also resolved, that if trees are blown down with the wind, the lessee, without impeachment of waste, shall have them.

After this determination, it was a necessary consequence, that in general, unless on particular circumstances, the lessee for life, without impeachment of waste, was not to be restrained in equity.

But it is said that the clause was never extended to allow the destruction of the estate itself, and would not give leave to fell or cut down trees ornamental or sheltering of a house, much less to destroy or demolish a house: *Packington v. Packington*, 3 Atk. 215. In that case the Lord Chancellor declared that the Courts of Equity had in this respect established rules much more restrictive than those of the common law, which gave tenant for life without impeachment of waste, as large a power over the timber, as tenant in fee simple, that timber might be had for public use: 7 Bac. Abr. Waste, 289. It was malicious, extravagant, humorous waste which the Courts of Equity would restrain.

The parties here have disregarded the provision of our own statute, passed February 28, 1821, ch. 34, which provides, "that any person seized of a freehold estate, or of a remainder or reversion in fee simple or fee tail in a lot of woodland or timberland in this State, whereon the trees shall have come to an age and growth fit to be cut, may petition to this Court to

have them felled and sold, and the proceeds invested for the use of those interested in such woodlands."

It is not to be questioned, that conformably to the strict construction adopted in Massachusetts, that for a tenant in dower to cut timber for sale would be waste, and produce a forfeiture of the place wasted. And so in this State.

But upon the deeds and facts agreed is the defendant, Isaac York, to be subjected to the unmitigated consequences of his acts, as if he was a mere tenant for life without any excuse.

Almost the whole of the cases have arisen under leases, or devises, etc. Here he was original owner, conveying the land in fee, reserving to himself the use and control of the lands during his natural life. It may well be doubted whether this alone would protect him, though the terms are very broad. But though the second deed, under which the plaintiff claims, as purchaser of the trees, might seem to extend to defendant a greater latitude, yet the terms use and control of the land, do not necessarily include destruction of the timber.

In *Davis v. Uphill*, 1 Swanston, 129, an estate had been limited to Ann Uphill for life, remainder to her children, by her deceased husband, as she should appoint; in default of that appointment, to the children in common. They agreed with her, that on her joining in a recovery, the first use should be to her for life, without impeachment of waste. Some difficulty occurred in the conveyance. She commenced cutting, and an injunction was obtained. But the Court refused to continue it to restrain her from cutting timber, unless security was given to her for the full value of all she might cut in her lifetime. This was in 1818.

The expressions in the deed of Joseph York to the plaintiff, reserving so much of said trees and timber for the benefit of Isaac York as shall be necessary, convenient, and indispensable to the enjoyment of the premises during his natural life, might possibly have misled the defendants to a supposition that they were equivalent to the expressions without impeachment of waste. But besides this, they may have supposed that the plaintiff has no exclusive property in the trees and

timber, till what should be left was ascertained and designated by Isaac Spring.

It does not appear but what the trees cut were of suitable growth, and fit to be cut. See 8 Term Rep. 145, *Martin v. Knowlys*. It is not stated that they were intended to be applied to the repairs of the fences or buildings, but the poverty and age of the defendant shows that the supply would be *convenient*, if not necessary for his enjoyment of the premises.

In Virginia it is held by *Roane, J.*, *Findley v. Smith*, 6 Munf. 134, that in considering waste in this country, the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situations and circumstances of the country. That cannot be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land in such circumstances, would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. Here the widow is not dowable of wild lands, and so is not put in temptation to fell the trees.

In the case under consideration, it is not among the facts agreed that what was done was to the prejudice of the plaintiff's inheritance. *The whole is left on the allegation of a cutting of pine and hemlock timber.*

We must gather the intention of the parties from their deeds, as well as we can on the words in the deed. And though we may conjecture that the grantor, Isaac, intended not to be limited by the terms *use and control* to anything but the employment of the property during his life as he did before; and though this conjecture is strengthened by Joseph's explanation or enlargement in the deed to the plaintiff, and though it does not appear, but there is sufficiency of such timber left for the remainderman, yet upon the facts agreed the plaintiff, according to the rules of law, *upon the severance by the defendants of the pine and hemlock timber from the freehold, became the owner of it.* We may lament the carelessness with

which parties have instruments drawn relating to the relative rights of tenant for life and persons in reversion or remainder. But in this case, in the opinion of the Court, the defendant, Isaac York, by his reservation, remained liable to impeachment of waste, and therefore the defendant must be defaulted.

**A deed of land for an indefinite period, as, "so long as the salt-works there intended to be erected shall continue to be used," conveys a life estate to the grantee.**

HURD *v.* CUSHING,  
Supreme Judicial Court of Massachusetts, 1828.

7 Pick. 169.

**WILDE, J.** The defendant's title, as appears by the facts agreed, is derived from one Thomas Cushing, and through him from David Thacher and Isaiah Smalley, three undivided fourth parts being derived from Thacher, and the remaining fourth part from Smalley. And as the titles of Thacher and Smalley depend on different principles, they will be considered separately.

It appears that on the 28th of December, 1807, an agreement was made between Thacher and Smalley respecting the erection and use of certain salt-works, then contemplated to be built, and which are now standing on the demanded premises. By the terms of this agreement Thacher was to furnish the materials for the salt-works, and Smalley was to furnish the land upon which they were to be erected. In pursuance of this agreement Smalley afterward procured a lease of a tract of land, including the demanded premises, from one Ricketson the owner, by which the same was granted and demised to him for an indefinite period of time, and so long as the salt-works then intended to be erected should continue to be used. By virtue of this lease the legal estate was vested in Smalley during his life, determinable by his ceasing to occupy the salt-works. On the 8th of April, 1817, Smalley conveyed an undivided fourth part of the demanded premises to Thomas

Cushing. This was intended as a mortgage or security, and a bond of defeasance was given by Cushing to Smalley, but as this bond was not registered, and as the defendant had no knowledge of it when he extended his execution on the premises as the estate of Cushing, it is very clear, we think, that his title cannot be affected by that bond. The defendant therefore acquired by the levy of his execution against Cushing all the original title of Smalley to an undivided fourth part of the premises; and as to this part he would be clearly entitled to recover, but for the death of Smalley. By his death the estate of the defendant was determined, and his right of action destroyed. And this fact may be pleaded in bar of the action, or may be given in evidence on the general issue, if the parties so agree; and it being thus agreed in this case, it is clear that the defendant's title derived from Smalley can no longer be maintained: Jackson on Real Actions, 168.

The same objection would apply to the title derived from Thacher, if he and Smalley were seised in common, as the defendant contends they were, by virtue of their agreement, and by the erection of the salt-works. We are, however, of opinion that Thacher had no legal title to the land; and that, therefore, it is immaterial whether the salt-works are fixtures or not. The legal estate was clearly in Smalley; and if the works were fixtures, they passed with the land, and if they were personal property, the defendant acquired no title to them by the levy of his execution. All the right or interest which Thacher had in the land was a parol license to enter for the purpose of repairing and using the salt-works; but this is not such a title as would enable him or his assigns to maintain a writ of entry. He was never seised, and therefore could not be disseised.

Nor can the defendant recover on his title by disseisin, or by estoppel.

True it is that Cushing, by virtue of the levy of his execution against Thacher, became actually seised by disseisin, and this title passed to the defendant under the levy of his execution against Cushing. But this was a wrongful seisin, and was defeated or determined by the entry of Smalley. He entered in 1823, and since that time he and one Nathaniel

Cushing, and their representatives (the tenants being administrators of Nathaniel Cushing), have occupied the premises; so that it is clear that the defendant cannot now recover on a title by disseisin.

Nor can he recover on a title by estoppel. Smalley and Ricketson were strangers and not parties to the proceedings between Thomas Cushing and David Thacher. They acted merely as appraisers, and had no right to object to the form of the proceedings. And besides, they might have been, and probably were, ignorant of their legal rights; and they were not bound to inform themselves as to the irregularity of the proceedings. As to the deed from Smalley to Cushing, his right only passed by it, and not a fee by disseisin. The words of the grant are, "all my right, title, and interest, in and to one undivided fourth part," etc. It is true that the language of the covenants is more extensive; but this will not enlarge the words of the grant so as to work a constructive disseisin of the land.

Upon the whole, therefore, we are of opinion that the defendant is not entitled to recover, and according to the agreement of the parties he is to be non-suited.

Judgment for tenants for costs.

A conveyance to J. M. and his generation, to endure "so long as the waters of the Delaware shall run," creates in the grantee only a life estate: *Foster v. Joice*, 3 Wash. C. C. 498.

b

**By Will.**

**A life estate may also be created by will, as where a devise of land contains no words of perpetuity and no words appear in the will from which a fee can be raised by implication.**

**JACKSON v. EMBLER,**  
**Supreme Court of New York, 1817.**  
14 Johns. 198.

**PER CURIAM.** The lessors of the plaintiffs claim five-eighths of the premises as heirs-at-law of Henry Newkirk, deceased; and the defendant claims under title derived from the will of

Henry Newkirk, by which the premises are claimed as devised to his son James Newkirk. The words of the will are, "I give, devise, and bequeath, to my son James Newkirk, the two lots of land Nos. 5 and 6, in the last division of the five thousand acre tract, containing one hundred and forty acres." James Newkirk died before the commencement of this suit; and the only question is, whether, under the above devise, he took a fee or only a life estate. A life estate only passed under this devise. There are no words of perpetuity, nor is there anything in the will from which a fee, by implication, may be inferred. We are accordingly of opinion that the plaintiff is entitled to judgment for five-eighths of the premises.

## C

## By Jointure.

A jointure is a freehold estate in lands or tenements, secured to the wife, which is to begin upon the death of her husband and continue during her life at least, unless terminated by her own act, and is usually a provision for the wife in lieu of dower.

GROGAN v. GARRISON,  
Supreme Court of Ohio, 1875.

27 Ohio St. 50.

JOHNSON, J. The defendant in error, Emma G. Garrison, formerly Emma Grogan, filed her petition for dower, stating therein that she was the widow of one William Grogan, who, during coverture, was seized of certain lands, out of which she asks an assignment of her dower as provided by law.

The property is described as being lot No. 9, etc., fronting on Fifth Street, Cincinnati, twenty-five feet, and also the southwest part of lot No. 10, etc., also fronting ten feet, on Fifth Street, each one hundred and sixteen feet deep, making thirty-five feet front by one hundred and sixteen feet in depth.

William H. Grogan, a minor, and the only son of the deceased, by a former marriage, and John Parker, administrator of William Grogan, are made defendants.

William H. Grogan, by his guardian, filed an amended answer, setting up as a bar to this action an antenuptial contract, a copy of which, by order of the Court, is made part of the answer.

To this the petitioner demurs, on the ground that said amended answer does not state facts sufficient to constitute a defense.

Upon the issue thus made the case was reserved for hearing to the general term, where it was held that the matters set up as a bar were insufficient, and decreed that the petitioner was entitled to dower.

This action is brought to reverse that judgment.

By the record it appears that the case came on for hearing at the general term, on the petition, amended answer, and demurrer thereto, upon the questions presented by the pleadings.

The Court, without directly passing on the demurrer, virtually does so by special findings of the truth of the facts stated in the petition; also that the defendant is in possession of the premises described in the petition, claiming the estate of the plaintiff therein, and that the plaintiff had notified him of her claim, and requested that her dower be assigned, which he refused to do. It is then adjudged that she be endowed of one equal third part of the lands in the petition described.

The Court then proceeds to find that as, by certain proceedings in the Probate Court of said county, the plaintiff's dower interest in said premises "has been set off in dollars and cents, all proceedings therefore to set off the same by metes and bounds, by virtue of any order of this Court, is waived by the parties hereto."

Upon this finding, it is ordered "that the plaintiff receive her dower in money, as set off to her in said Probate Court, and that defendant pay the costs," etc.

No mention is made of the demurrer; but the findings and judgments that she was entitled to dower was, in effect, sustaining it.

It is a little difficult to understand these two orders—the one that she is entitled to dower in one equal third part of the premises, and the other that the land had been sold in another Court, and dower in money already assigned; in which last proceeding she had waived her right to the relief sought in this action.

Assuming, however, that the record is defective upon this point, we proceed to an examination of the errors complained of.

The errors assigned are:

1. The Court erred in holding that the amended answer did not constitute a *statutory jointure* in bar.
2. In holding said answer did not amount to an equitable bar.
3. In holding that the petitioner was not estopped by reason of the facts stated in said answer.
4. In holding that the burden of proof was on the defendant to show that said antenuptial contract was reasonable.

As to this last assignment, it is sufficient to say that there is nothing of record to show that the Court did so hold. The demurrer having been virtually sustained, though not formally, there remained no defense to the action.

The defendant being a minor, it became the duty of the Court to be satisfied of the truth of the petition before rendering a judgment. The record shows the facts specially found, but no such holding as is complained of appears.

The remaining errors assigned make it necessary to give a full synopsis of the defense.

The amended answer, with the antenuptial contract which it sets up, states that previous to February 23, 1867, there was a treaty between the plaintiff and said William Grogan, concerning marriage between them; that she was of full age, and under no restraint; that he was many years her senior, and of feeble health, and was the owner of the premises described in the petition, and a small amount of personality; that he had one child, the defendant, by a former wife; and that the terms of an adjustment of the rights of the plaintiff, in the event of

their marriage and her survivorship, were freely discussed and agreed on.

He agreed to enter into said marriage only on the condition that she would bind herself to accept, in the event of his death—an event then anticipated as not, likely, very remote—a certain interest in his estate, in full satisfaction of her claims as his widow; and on the 23d of February, 1867, she freely and voluntarily entered into a written agreement to that effect, which was duly executed and acknowledged by both parties, whereby it was stipulated that said Grogan, in consideration of said marriage about to take place with plaintiff, whose name was then Emma Mitchell, did thereby grant, bargain, sell, and convey to her, *during her natural life*, real estate in Cincinnati, described as follows:

*"All that lot of land, situate in said city, and being the one undivided one-third part of the southwest part of lot No. ten [10], in Ewing's subdivision, fronting ten [10] feet on Fifth Street, and running back on Kilgour Street, on lines parallel with said street last named, one hundred and sixteen feet nine inches [116 $\frac{1}{4}$  feet], said lot hereby conveyed being part of ground purchased by said city for the purpose of extending Kilgour Street."*

It is averred that this land so conveyed was in full satisfaction of her dower.

The parties were married February 24, 1867, and he died in August thereafter.

The answer concludes: "Wherefore, he denies that said petitioner is entitled to dower, *as claimed in the petition*, and asserts that adequate provision was made for her by the aforesaid jointure, and prays that *her claim may be restricted to the premises set forth in the contract*."

The prayer that *her claim*, which was to have dower in this ten feet as well as in the twenty-five feet in lot No. 9 adjoining, be *restricted to* the premises just described—that is, to the ten feet—would seem to imply that the pleader understood this contract as embracing a life estate in the undivided one-third of ten feet front by one hundred and sixteen feet deep, though,

in argument, it is insisted that this description embraced all of the ten feet front, and not an undivided one-third. We do not so understand it.

The will of deceased is printed as part of the record.

There is no statement of facts showing the extent and value of William Grogan's property at the date of the marriage, nor of the value of the part conveyed nor of that remaining, to enable the Court to say whether it was adequate or not.

There is no averment that the deed was ever delivered to her, or that she, either during or after coverture, ever had possession ; on the contrary, the Court finds, as one of the reasons doubtless for sustaining the demurrer that the premises are in the possession of the defendant ; and still more, that, by proceedings in the Probate Court, instituted, as they must have been, by the defendants, or one of them, the property had been sold and converted into money.

We mention this as accounting for the absence of such important averments in this defense.

Grogan died in August, 1867, and this petition was filed in 1870, and the presumption is that, during the interval, this real estate, now set up as a jointure, was held and controlled by the heir, and, for aught that appears, she declined to accept the provision thus made. Was she bound to accept it?

The petitioner declined to take under the will.

The will refers to this antenuptial contract, and declares that "she shall not have any dower in my real estate *described in the contract*; . . . that is to say, that said Emma Grogan shall have no dower in the real estate *mentioned and described in said contract*."

Let us inquire :

1. Was this antenuptial contract a legal bar to an action for dower?

If it was, then this action was improperly brought. The statute of Ohio, on this subject reads :

"Sec. 2. If any estate shall be conveyed to a woman as *jointure*, in lieu of her dower, to take effect immediately after

the death of her husband, and to continue during her life, such conveyance shall bar her right of dower.

"Sec. 4. That when any conveyance, intended to be in lieu of dower, shall, through any defect, fail to be a *legal bar* thereto, and the widow, availing herself of such defects, shall demand her dower, the estate and interest conveyed to such widow with intention to bar her dower shall thereupon cease and determine."

What, then, is a *jointure*, under this statute?

It is a word having a fixed legal signification, long prior to the enactment of our Dower Act?

The section quoted is, in fact, but the adoption of a similar provision, found in Stat. 27 Henry VIII, c. 1056, which enacted that where lands are settled to the use of the wife, "that then, in every such case, every woman having such jointure . . . shall not have title to any dower in the residue."

This Act of Parliament was enacted to prevent a woman from having both dower and jointure.

Before its passage, accepting a jointure was not a bar to her action for dower.

Under this statute the word jointure had as definite and well-defined legal meaning as any other legal term.

It was an estate made to the wife in satisfaction of dower. Sir Edward Coke says "that to the making of a perfect jointure, within that statute, six things are to be observed :

"1. It is to take effect for her life in possession or profit, presently after the death of the husband.

"2. It must be for her own life or for a greater estate.

"3. It must be made to herself, and to no other for her.

"4. It must be made in satisfaction of her whole dower, and not of part of her dower.

"5. It must be expressed or averred to be in satisfaction of her dower.

"6. It may be made either before or after marriage."

He adds : "So as to comprehend all in a few words : A jointure . . . is a competent livelihood of freehold for the

wife, of lands or tenements, to take effect presently in possession or profit after decease of the husband ; now, as dower *ad ostium ecclesiae*, or *ex assensu patris*, is better for the wife, because, in respect to certainty, she may enter, than dower at common law where she is driven to her action, and therefore Britton calleth dower *ad ostium ecclesiae* and *ex assensu patris*, establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertain is established) ; so jointure (that hath the force of a bar of dower by said Act of 27 Henry VIII), is, hath been said, more secure and safe for the wife than dower *ad ostium ecclesiae* or *ex assensu patris*, for besides it is as certain as these others, and she may enter into it, after the death of her husband, and not be driven to her action :" Coke on Lit., § 41, note 8.

A jointure with all these qualities is binding on the widow, and a complete bar to her claim : 1 Cruise Digest, title 7, ch. 1, § 19.

But it had to be as certain as dower *ad ostium ecclesiae* or *ex assensu patris*, and to be better than these ; and, as Coke says, more secure and safe for the wife than either of these, or than dower at common law. It had to be established, so the wife could enter, after the death of her husband, and not be driven to her action.

It is said jointure is to be as certain as dower *ad ostium ecclesiae* or *ex assensu patris*. How certain were they ?

Coke says : " Dowment *ad ostium ecclesiae* is where a man of full age, seized in fee simple, who shall be married to a woman, and when he cometh to the church-door to be married, then after affiance and troth plighted between them, he endoweth the woman of his whole land or the half or other lesser part thereof, and then openly doth declare the quantity and the certainty of the land which she shall have for her dower. Here be two things that the law doth delight in, viz. : To have this and the like openly done ; second, to have certainty, which is the mother of quiet and repose, and this word (moiety), above said to be intended of the half in certainty, and not of the moiety in common, which clearly appeareth in that here Little-

ton saith the quantity and certainty of the land :" Coke on Lit., title Dower, § 39.

So dower *ex assensu patris* must have the same quality of certainty. It must be "of parcels of his father's lands or tenements with the assent of his father, who after assigns the quantity and parcels. In this case, after death of the son, the wife shall enter into the same parcel, without the assignment of any :" Coke on Lit., title Dower, § 40.

Jointure was as certain as dower *ad ostium ecclesiae* or *ex assensu patris*. It was more secure and safe than either of these. It was, like them, an establishment of dower by the husband, and better than either of these, she might enter into it, after the death of her husband, and not be driven to her action. This was doubtless for the reason that it was evidenced by a conveyance in writing.

In Vernon's Case, 4 Coke, 1, the leading one on the subject, it is said "that dower *ad ostium ecclesiae* and *ex assensu patris* concluded the wife of her dower, if she entered into the land so assigned to her after the death of her husband, for these being in such form as the law requires to be dowers in law, an assignment of dower, when the husband was sole seized, cannot be made of the third or fourth part in common, but ought to be in severalty :" 1 Thomas's Coke, 597.

At common law it was imperative as a requisite of dower that the husband should be *sole* seized.

Upon estates held in joint tenancy no dower would attach: Lit., § 45; 1 Scribner on Dower, 257.

So stringent was this rule, that where one joint tenant aliened his share, destroying the possibility of survivorship and severing the tenancy, the widow of the alienor could not claim dower: 4 Kent, 37; Coke Lit., § 31 b.

The reason for this rule is obvious, and applies with equal force to a jointure.

The sole seisin of the husband was indispensable, because only in such case could dower be assigned by metes and bounds, and as jointure was in lieu of dower, the same qualities as to the estate granted necessarily existed.

It must be so assigned as to be held in severalty without an action at law.

By the terms of our statute jointure must be an *estate*, conveyed as *jointure*.

If from any defect it fail to be a *legal bar* to dower, and the widow elects to take advantage of this defect, and demands her dower, the estate conveyed as jointure shall cease and determine.

In what sense, then, is this word jointure used? It was a term which, for more than two hundred years, had had a fixed legal signification. Long prior to the adoption of the Act of 27 Henry VIII, jointures were in common use, and their meaning well understood.

That statute, from which ours is almost literally borrowed, has been carefully considered in many reported cases by the most profound jurists of England. The repeated discussions, and the long line of decisions, growing out of this Act, and similar ones in most of the States of the Union, were doubtless familiar to our ancestors, who incorporated a like provision in the statutes of Ohio. They were men well versed in the common law, and especially that part relating to real estate.

It is well established as a rule of interpretation that where particular words or phrases have in law an acquired, fixed legal signification, and are thus incorporated into a statute, the legal presumption is that the Legislature meant to use them in this legal sense: *Turney v. Yeoman*, 14 Ohio, 207.

Where a statute speaks of a *deed*, it must be taken in its technical sense, as understood at common law—that is, a writing sealed and delivered by the parties: *Moore's Lessee v. Vance*, 1 Ohio, 10.

So, also, where the word *mortgage* is used, it will be assumed that it is used in its ordinary legal signification, as well understood at common law, and that the legal liabilities incident to it were understood to follow: *Per Scott, J., Medical College v. Zeigler*, 17 Ohio St. 52.

Guided by this rule of interpretation, and by the light of the authorities and decisions referred to, we are led to conclude

that the estate to be conveyed as jointure must possess those prime requisites enumerated by Littleton and Coke, which we have quoted—that there must be such an estate as the widow can enjoy in severalty. It must declare the “*quantity* and *certainty*” of the lands she shall have—the “two things that the law doth delight in”—first, to have it done under our land statute, by a solemn deed of conveyance; and, second, to have “in *certainty*, which is the mother of quiet and repose.” And Lord Coke adds, speaking of certainty in dower at the church-door, and commenting on Littleton’s text: “This word *moiety* means a half in *certainty*, not of *moiety* in common.”

In Winch’s Cases, p. 33 (London, 1657), it is said, to be a good jointure, a wife must have a sole estate, after the death of her husband.

In the case at bar the conveyance is fatally defective in this prime quality of certainty.

It conveys an undivided one-third for life. The widow cannot enter and enjoy in severalty; she would be driven to her action at law to have it assigned and set apart to her.

One of the prime reasons for making a jointure was to give the wife the right, without her action, to enter and be sole possessor.

Again, to constitute a good conveyance of an estate, the deed must not only be duly executed, but it must be delivered.

We therefore hold that this antenuptial contract, for the reasons stated, is not a good statutory bar.

II. The next inquiry is, was it good as an equitable jointure?

What constitutes an equitable bar is a question fruitful in decisions.

Much learning and many conflicting decisions can be found in the books.

The substance of all the decided cases is that any provision made before marriage, whether of lands and tenements, goods and chattels, or whatever description of property, that constitutes a valuable consideration, if fair, reasonable, and just, as between the parties, in view of all the circumstances of the

case, at the time the contract was made, will, in equity, be supported as a good equitable jointure: *Miller's Ex'r v. Miller*, 16 Ohio St. 532; 2 Scrib. on Dower, 385-401.

Each case must be determined on its own particular facts and equities.

Looking at all the facts disclosed by this answer, and the absence of averments, we have arrived at the conclusion that this contract is not, in equity, a bar.

It conveys less than *one-tenth* of the real estate; no value is stated; it was only for life, in less than one-third of the whole; nothing was ever done to put her in possession; no acceptance by her, or part performance; and no facts stated to show that it was fair, reasonable, or just to her.

It has been an axiom, accepted for ages, that dower was to be favored; that no widow should be barred of that ancient and cherished right, unless

1. There was settled upon her, in strict conformity to law, an estate, as jointure, possessing all those requisites already pointed out; or

2. There were such adequate provisions made, in lieu of dower, as, under all the circumstances, was fair, reasonable, and just.

III. As to estoppel. Neither do we think the petitioner estopped. She has done no act during or since coverture that amounts to an estoppel.

Her antenuptial covenant to accept this conveyance in lieu of dower cannot have the effect to release her dower.

In the case of *Hastings v. Dickinson*, 7 Mass. 155, the Court says: "This leads us to the second ground, viz.: that the defendant's covenant ought to have the effect of a release of dower. But this effect cannot be admitted on any correct legal principle. It is true that a covenant never to prosecute an existing demand shall operate as a release to avoid circuity of action. But a release of a future demand not then in existence is void. Now in this case, the settlement being executed before marriage, the demand of dower had no existence, the same being inchoate."

In the case of *Vance v. Vance*, 8 Shepley (Maine), 364, the Court says: "There can be no estoppel by executory covenants not to claim a *right* which is first to accrue afterward. The covenants of the wife with the husband before marriage, that she will not claim dower in his estate, cannot operate by way of release, estoppel, or rebuttal to bar her of her dower."

The judgment of the Superior Court is therefore affirmed.

WILLIAMS, R. P. 235; 4 Kent Comm. 55, 56; Boone, R. P. 72; McCarter v. Teller, 2 Paige, 511; *Vance v. Vance*, 21 Maine, 364; *Hastings v. Dickinson*, 7 Mass. 153; *Tewis v. McCreary*, 3 Met. (Ky.) 151. Marriage settlements now usually take the place of jointures: *Tiedeman*, R. P. 148.

d

**By Marriage Settlement.**

Parties in contemplation of marriage may by contract, equitable and fairly made, fix the rights which each shall have in the property of the other during life, or which the survivor shall have in the property of the other after his decease, and thus exclude the operation of law in respect of fixing their rights.

**DESNOYER v. JORDAN,**

Supreme Court of Minnesota, 1880.

27 Minn. 295.

GILFILLAN, C. J. The appellant and Stephen Desnoyer were married in this State May 7, 1873, and he died December 3, 1877, she surviving him. His estate being in course of administration, she applied to the Probate Court in Ramsey County, in which the administration was pending, asking that one-third of the real and personal property might be set off to her as the widow, and as her portion of the estate, pursuant to the statute. The application was opposed by the heirs, and the Probate Court denied it. She appealed to the District Court, and that Court found as facts that "previous to their marriage, and just prior thereto, and in contemplation thereof, said parties (appellant and Stephen Desnoyer) en-

tered into a mutual agreement in writing, executed by each of them under seal, and acknowledged before a notary public, and witnessed by two witnesses, whereby, in terms, Stephen Desnoyer, in contemplation of said marriage, and in consideration thereof, and in consideration of the services theretofore rendered to him by said Sally Johnson (appellant) as house-keeper, did grant and convey to said Sally Johnson, after his death, and for the term of her natural life, the real estate and appurtenances situate in the county of Ramsey, and State of Minnesota, described as follows (description), and did give and grant to her after his death, and during her life, the sum of \$500 per year out of his estate, to be paid to her in equal semi-annual installments, and did make the same a charge upon all his estate, and did also give to her absolutely at his death a horse, a buggy, a harness, a sleigh, and a cow. In consideration thereof, said Sally Johnson did, by said agreement, in terms release said Desnoyer for past services, and did release all dower and right of dower in his lands, and all her interest or claim of any kind in and to the estate and property of said Desnoyer, which might arise by reason of said marriage, except as to the provision made for her in said agreement." The Court also found the agreement was not cancelled or abrogated. The agreement was not recorded. The land described in it was owned and occupied as a residence by Desnoyer at the time of making the agreement and of his death, and was parcel of a tract owned by him of about three hundred acres. The contract was not produced on the trial, but the evidence as to its execution and contents was fully sufficient to sustain the finding of the Court below. Indeed, it is difficult to see how the Court could have found otherwise. And there is little, if any, evidence tending to show that it was afterward cancelled.

The question of appellant's homestead right (if it were to be conceded that it is not disposed of by this antenuptial agreement) cannot be considered; for, in her petition on which this proceeding is based, she expressly disclaims any intention to claim such right, and the evidence is not such

as to identify any homestead beyond that described in the agreement.

The agreement contemplated that, except as provided in the agreement itself, the appellant should be excluded from any right or interest in Desnoyer's estate that might otherwise accrue to her by reason of the marriage about to take place between the parties. In the absence of a valid agreement between the parties, the law fixes the rights which either the husband or the wife shall have in the property of the other, both during life and after the death of either. But it has always been permitted to the parties in contemplation of marriage to fix those rights by agreement, equitable and fairly made between them, and to exclude the operation of the law in respect to fixing such rights; so that, so far as the agreement extends, it, and not the law, furnishes the measure of such rights. That such antenuptial agreements might be made was recognized in the statute in force when this agreement was made: Gen. St. (1866) c. 69, §§ 1, 4; c. 48, §§ 14-17. The latter of these statutes did not limit (as appellant argues) antenuptial contracts to barring dower alone. It only prescribed what sort of provision for the wife, in any such contract, should have the effect to bar dower; that it must be a jointure of a freehold estate in lands for her life, at least, to take effect in possession or profit immediately on the death of the husband, or a pecuniary provision for her benefit in lieu of dower; such jointure or pecuniary provision to be assented to by her before the marriage. But it did not disable the parties to make an antenuptial contract which should, in any other respect, fix the rights of the parties in the property of each other.

The parties having made their contract, and it being one which they were competent to make, and there being nothing to impeach its fairness or equitable character, and it clearly providing that the wife shall have no right or interest in the estate of the husband other than that provided in the contract, this would seem to dispose of the case. But it is claimed that subsequent Acts of the Legislature confer on the wife, surviving her husband, rights in his estate which obtain, notwithstanding-

ing the antenuptial contract stipulates she shall have none other than it provides for. At the time this contract was made, a widow was entitled to dower in the real estate of her deceased husband (unless barred, as in the statute provided), and in case of intestacy to certain allowances out of, and to the same distributive share of, his personal estate as a child of the intestate would have. Afterward dower was abolished, and in 1876 the Legislature passed an Act (Laws 1876, c. 37; Gen. St. 1878, c. 46, §§ 2, 3) which entitles the surviving husband or wife to a life estate in the homestead of the deceased, free from all claims on account of debts of deceased, and also absolutely to one-third of the real estate of which the deceased was seized during coverture, subject in its just proportion with the other real estate to such debts of deceased as are not paid out of the personal estate.

Unless the operation of this statute is prevented by the antenuptial contract, the appellant is entitled, as to the real estate at any rate, to what she claims. But, inasmuch as the contract excludes all such rights as the statute assumes to give, the latter can have no effect without overriding the former—that is, without impairing its obligation. Now, though the contract of marriage and its incidents, including rights of property depending on it, while such rights of property remain inchoate and are mere expectancies, may be within the power of the Legislature to vary or affect by subsequent legislation, it is not so with an antenuptial contract. Such a contract is founded on a high consideration. Rights under it are contract rights as much as any can be, not merely resting upon or incident to the relation of husband and wife. They are independent of such incidents. Such a contract is under the constitutional protection as much as any contract. So, even if the Legislature intended, by the statute last cited, or by that in 1876, regulating distribution of personal estate of a deceased person (Laws 1876, c. 42; Gen. St. 1878, c. 51, § 1) to give rights contrary to the provisions of antenuptial contracts then existing, the statute would, to that extent, by reason of the constitutional inhibition against laws impairing the obligation of con-

tracts, be inoperative; but we do not think the Legislature intended to affect such contracts in any way.

Judgment affirmed.

*Hosford v. Rowe*, 41 Minn. 245.

Antenuptial contracts may be made, which are not *jointures* or marriage *settlements*, but simply *contracts* fixing the rights of the parties in the property of each other: *Naill v. Maurer*, 25 Md. 532.

The marriage alone may be a sufficient consideration: *Gelzer v. Gelzer*, 1 Bailey's Eq. 387; *Wentworth v. Wentworth*, 69 Me. 247; *McNutt v. McNutt*, 19 N. E. R. 115. *Contra*: *Curry v. Curry*, 10 Hun, 368.

But see *Clark v. Clark*, 28 Hun, 509; *Young v. Hicks*, 27 Hun, 57.

## 2

### LEGAL LIFE ESTATES.

A life estate created by operation of law is called a legal life estate, and arises as follows:

#### a

##### Courtesy.

An estate by the courtesy is a freehold estate, not of inheritance, created by act of law, which the husband acquires at the death of his wife in the lands of which she was seized during their coverture.

*Ferguson v. Tweedy*,

Court of Appeals, New York, 1871.

43 N. Y. 543.

FOLGER, J. This action cannot be sustained unless Harvey D. Ferguson, the testator, had in his lifetime an estate as tenant by the courtesy in the premises, or some part of them, which were recovered in the action of the respondents against Samuel G. Green, judgment wherein was rendered on the 1st of February, 1861. To establish such tenancy there were needed four things: Marriage, issue of the marriage, death of the wife, and her seisin, during marriage, of the premises in question. There is no dispute but that all of these existed, save the last.

It is a general rule that to support a tenancy by the courtesy

there must be an actual seisin of the wife: *Mercer's Lessee v. Selden*, 1 How. U. S. 37-54. The rule is not inflexible. There are exceptions to it. The possession of a lessee under a lease reserving rent, is an actual seisin, so as to entitle the husband to a life estate in the land as a tenant by the courtesy, though he has never received or demanded rent during the life of his wife: *Ellsworth v. Cook*, 8 Paige, 646. Wild, unoccupied or waste lands may be constructively in the actual possession of the wife: 8 J. R. 271. A recovery in an ejectment has been held equivalent to an actual entry: 8 Paige, *supra*. And it has been held that where the wife takes under a *deed* and there is no adverse holding at the time that *actual* entry is not necessary: *Jackson v. Johnson*, 5 Cow. 74. But the facts of this case open not the door for any of these exceptions to come in. Before the marriage of the testator to his wife she did convey by quit-claim deed the premises in question for a term which was in its duration as long as her life. The grantee in that deed, thus acquiring an estate for her life in the lands, did enter, and he and his assign held the possession up to her death and afterward. It is true that this deed was one of two interchanged between the parties to effect an amicable partition of premises held by them at that time in common. But the execution of these deeds, if followed as it was, by possession in severalty, was valid and sufficient to sever the possession for the lifetime of the testator's wife: *Baker v. Lorillard*, 4 N. Y. 257; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, 21.

And from the time of the execution by her of that deed, until the day of her death, she had not, nor had her husband, actual possession of the premises; she nor he made claim to the possession of them; she nor he received rent or other profit from them; she nor he had right to ask possession or rent or profit. In short, there did not any fact exist which, for her lifetime, after the execution of the deed, gave her a constructive possession or right of possession. On the contrary, there did exist in another, so far as she and her husband were concerned, exclusive possession and right of such

possession for a term which ran for her life. There was then an outstanding estate for life in the premises which, beginning before her coverture began, did not end until her coverture ended. And it is settled that if there be an outstanding estate for life the husband cannot be the tenant by the courtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture: *Stoddard v. Gibbs*, 1 Sumner, 263-70; *In re Cregier*, 1 Barb. Ch. R. 598.

It is among the facts found by the learned Justice before whom the action was tried that the possession of the grantee in that deed and of his assign was actual and exclusive. It is found, also, that neither the wife of the testator nor the testator himself did at any time after the execution of that deed have actual possession of the premises or receive the rents and profits thereof. And these findings are upheld by the proof.

There is no escape from the conclusion that there was lacking one of the essentials in a tenancy by the courtesy in favor of the testator.

This defect in the plaintiff's case being fatal, it is not necessary that we examine the other questions involved.

The judgment of the Court below should be affirmed with costs to the respondent.

*Jackson v. Johnson*, 5 Cowen, 74; *Heath v. White*, 5 Conn. 228; *Pemberton v. Hicks*, 1 Binn. 1.

**Courtesy attaches not only to estates in fee simple and fee tail, but also to fees subject to a conditional limitation on failure of issue.**

**THORNTON'S EXECUTORS v. KREPPS,  
Supreme Court of Pennsylvania, 1860.**

37 Pa. St. 391.

A. devises land to B. and her heirs forever; provided, however, that if B. should die without issue living, then the estate should revert to A. B. marries and has a child, which dies, and then B. dies without issue living. The executors of A. claim that the land then reverted to A.'s estate; but B.'s husband claims courtesy therein. Does he have it?

*Held*, that on the death of B. the land would revert to A.'s estate, subject to the right of courtesy, which attached as an initiate right during coverture and became consummate on the death of the wife.

LOWRIE, C. J. The incidents of an estate do not depend upon the intention of the grantor of it; but are engrafted on it by law, and, generally at least, without any regard to the intention of the grantor, and even in disregard of it. Our inquiry, therefore, is not after the intention of the testator relative to the claim of courtesy, but for the character of the estate intended to be granted by him, and whether courtesy is an incident in law to such an estate.

What, then, is the character of this estate as given by the will? It is not an estate tail, because the devise does not propose to limit the descent of it to the issue of the devisee. It is a fee simple subject to an executory devise—that is, a conditional limitation by will, which defeats it and substitutes another estate in its stead, if the devisee should die *both* under age and without issue then living: Smith's Executory Interests, §§ 148–151; 4 Casey, 108.

Does the common law give the husband of the devisee courtesy of such an estate after it has been defeated by the happening of the conditions? We think it does.

The case of Buchanan *v.* Shaffer, 2 Yeates, 374, decides this on the authority of Buckworth *v.* Thirkell, though possibly the case might have been decided in the same way on other grounds. The principle of this latter case has been very ably attacked and defended in the argument here, and we shall not repeat the discussion. In favor of the principle we have Kent (4 Com. 32, 8th ed.); Roper (1 Husband and Wife, 38–43), and Preston (3 Abst. of Title, 372, 384); and against it, we have Butler (note 170 to Coke on Littleton, 241 *a.*); and Park (Dower, 163–191). Roper on one side and Park on the other go very fully into the discussion of the authorities and the principle. Its supporters go on the substance of the principal estate, and its assailants on the form of its creation; and, owing to the innumerable variety of the forms of expression in which the same substantial estate may be created, we think it much

more certain to attach the incidents to its substance than to the form of its creation.

On a subject that involves so many difficult questions we confine ourselves carefully to the case before us, and say that courtesy attaches to an estate in fee—that is, subject to a conditional limitation on the failure of issue.

The case is not affected by the Married Woman's Act of 1848, for that expressly retains the courtesy estate as it existed before.

Judgment affirmed.

As to limitation over to a third person, see *Hatfield v. Sneden*, 54 N. Y. 280. Courtesy does not attach to estates on condition: *Washb. R. P.* 174. The conditional limitation is equivalent to an executory devise: *Buchannan v. Sheffer*, 2 *Yeates*, 374. Courtesy vests by operation of law, more in the nature of an estate by descent than by purchase, and cannot be divested by a mere disclaimer: *Watson v. Watson*, 13 Conn. 83. Courtesy generally attaches in this country to equitable estates: *Houghton v. Hapgood*, 13 *Pick.* 154; *Nightingale v. Hidden*, 7 *R. I.* 115; *Tillinghast v. Coggeshall*, 7 *R. I.* 383.

b

Dower.

An estate by dower is a freehold estate, not of inheritance, created by operation of law, which the wife acquires in the realty of her husband upon his death.

GRAY *v. McCUNE*,  
Supreme Court of Pennsylvania, 1854.

23 Pa. St. 447.

LEWIS, J. In *Leineweaver v. Stoever*, 1 W. & Ser. 160, it was held that the acceptance by the wife of her distributive share of her husband's estate under the intestate law, did not bar her action of dower in lands which her husband had conveyed to a stranger, and which formed no part of his estate at his death. In *Borland v. Nichols*, 2 Jones, 43, the same principle was applied to the acceptance by a wife of a devise under her husband's will. The first was a decision under the Act of

1794, and the other under that of 1797. Both statutes had relation exclusively to the estates of which the husband died seised or possessed. They could operate on no other. And the last, which is the only one material to be considered here, is express in its direction that the acceptance of a devise of any portion of his estate "shall be deemed and taken to be in lieu and bar of her dower *out of the estate of her deceased husband*, in like manner as if the same were so expressed." It was held that the statute could not be carried beyond its letter, and that as its general provisions related to the estate which belonged to the husband *at the time of his death*, and the particular effect of acceptance was confined by the statute *to that estate*, the Courts could not, by construction, enlarge it. The decisions referred to were constructions of law, given to the single act of accepting a distributive share or a devise. But the case before us demands a decision upon an instrument of writing, sealed and delivered by the party in whose right this action is brought. A release under seal is good without a consideration; and where, as here, it inures by way of *mitter le droit*, words of inheritance are not necessary. It would be well to make use of the most appropriate words, such as *remisisse*, *relaxasse*, *et quietam clamasse*, but these are not indispensable. The words *renunciare*, *acquietare*, etc., will answer as well. If one acknowledge himself *satisfied*, and discharge a debt, this is a good release: Shepherd's Touchstone, 327. The paper in question is duly executed under the hand and seal of Mary Ann McCune, in the presence of two witnesses. It bears date the 3d of July, 1835, when she was under no disability of coverture or otherwise. It is addressed, "To all to whom these presents shall come." It has come to the hands of the defendant below, and he gives it in evidence, and claims the benefit of it. He is not a stranger, but had possession of the property in dispute at the time of the execution of this instrument, and claimed to hold the land in fee simple under a conveyance from the first husband of Mary Ann McCune, dated the 11th of March, 1833. It would be a reproach to the law if this instrument under seal, thus fairly executed by the present Mrs.

Gray, were held to be null and void. It cannot be pretended by any one that it should be so regarded. It must, therefore, have effect according to its true intent and meaning. It is Mrs. Gray's own language, and therefore, in case of ambiguity or doubt, it is to be construed most strongly against herself. It was her business to express herself so as to be understood. If she intended merely to accept the provisions of her husband's will "in lieu of her dower *in the estate of her husband*," under the statute of 1833, it was her duty to say so. If the object was merely to acknowledge satisfaction of all right of dower out of the estate which belonged to her husband at his death, it was easy to say so, and it was her duty to say so in such language as could be readily understood. William C. McCune, in addition to his title as vendee under his conveyance from his father, was a son and an heir, and had an interest in knowing the extent of the satisfaction acknowledged. If he had not understood it as extinguishing all claims upon the land in his possession, it may be that he would have resorted to other measures for his protection. He might have raised a question in regard to the large provision made by the will for the widow, and the meagre one provided by the same instrument for himself. But the paper distinctly declared that said Mary Ann McCune *agrees* to take under the provisions of the will, and *accepts* the bequests therein, to her, *in lieu and full satisfaction of right of "dower at common law."* What is right of dower at common law? It is something more than right of dower out of *the estate of which her husband died seised.* Dower at common law is the one-third part of *all* the lands and tenements whereof her husband was seised, *at any time during coverture.* This is precisely the right which she released, and she has thereby discharged the land in controversy from her present claim. After making the declaration that although she had not signed the deed to William C. McCune, she "had signed an agreement of release to the same effect," after receiving for herself and her children property more valuable than all the rest of the estate, including what was sold to William; and after an acquiescence of nearly twenty years in

the settlement thus made, she comes with a bad grace to ask a recovery contrary to the plain meaning of her own deed. The cause is put upon the effect and true meaning of that instrument as expressed upon its face. In Pennsylvania it is not necessary that a release should be dressed up in legal and technical form. It is sufficient if it be in substance a release. The intention of the parties will be carried out in a Court of law, as fully as if they were before a Chancellor, and governed by the principles of equity. The instrument of writing signed by the defendant, in connection with the other facts in the case, sustains all that is material in the plea.

It is true that a conveyance of her right of dower to a *stranger*, for a consideration moving from him to her, could not sustain the plea of a release to the *defendant* who had no privity with such stranger. The suit might, notwithstanding such conveyance to a stranger, be carried on for her use in the name of the demandant. This is all that was decided in *Pixley v. Bennett*, 11 Mass. 298. In Massachusetts, a conveyance to a party *out of possession* passes no estate, and is therefore not evidence under the general issue in a writ of entry : *Wolcot et al. v. Knight et al.*, 6 Mass. 420. And in an action of dower *the tenant who does not claim under such conveyance*, and who *is an entire stranger to the consideration*, cannot set it up as a defense. If it passed no right, it was clearly no defense. If it did pass a right, the action might well be maintained for the benefit of the grantee or his assigns. In either case the defendant, being a stranger to it, had nothing to do with it. This is all that has any relevancy to this case in *Robinson v. Bates*, 3 Metcalf, 40. It is clear that these decisions, although cited by the plaintiffs in error to invalidate the defense under the release relied on in the case before us, do not sustain their positions. William C. McCune was neither a stranger to the consideration nor to the instrument itself. It was not a transaction between strangers. The provisions in the will, which the widow accepted in satisfaction of her claim, were drawn from estates which, but for the will and the acceptance by the widow, would have descended or fallen upon William McCune

himself; and the language of the instrument, as well as its object, shows that it was intended to operate in favor of the party who relied upon it at the trial.

This disposes of the whole case, and renders it unnecessary to discuss the other questions raised in the assignment of errors.

Judgment affirmed.

4 Kent Comm. 36.

To same point.

STEVENS *et ux.* v. SMITH,  
Court of Appeals, Kentucky, 1830.

4 Marsh. J. J. 64.

UNDERWOOD, J. In 1805, Joseph K. Glenn, then unmarried, executed an obligation to Smith, for the conveyance of sixty acres of land.

Afterward, to wit, in November, 1807, Glenn conveyed the land to Smith. Previous to the date of the conveyance, and subsequent to the execution of the obligation, Glenn married Mary, the wife at present of Stevens, she having since the death of Glenn, married Stevens. Said Mary did not unite with her former husband Glenn, in the execution of the deed to Smith. Since Glenn's death, Stevens and wife have filed their bill against Smith, praying for an assignment of dower, in the sixty acres of land, and the only question presented by the record is the validity of Mrs. Stevens' claim to dower, in virtue of her former marriage with Glenn.

By the common law, three things were necessary to vest in a woman a right to dower. 1st. That her husband, at some time, during the existence of the coverture should have been seized of the lands, in which dower is claimed, either in fee simple, or fee tail. 2d. Marriage. And 3d. The death of the husband, leaving the wife. There are, nevertheless, exceptions to these general propositions. A woman, for example,

shall not be endowed, both of the land given in exchange, and of the land taken in exchange, and yet the husband was seized of both : 1 Institute, 31, b.

According to the facts in the present case, Glenn had an actual seisin of the land conveyed to Smith, prior to his marriage with Mrs. Stevens. The possession in fact, of the sixty acres was transferred to Smith before the marriage, and never, during the existence of the coverture, did Glenn have actual possession of the sixty acres.

Before the conveyance executed in 1807, and subsequent to the execution of the bond for a title, in 1805, Glenn was legally seized in fee of the land, and while thus seized, the marriage took place, but notwithstanding such seisin it is manifest that he had no beneficial possession. By the contract with Smith, and the delivery of the possession to him, for his use and benefit, Glenn divested himself of the use and enjoyment of the land, and transferred it to Smith.

According to Coke, 1 Institut, 31, a woman shall be endowed where the husband is seized in law, as well as where the seisin is in deed, or a natural seisin, or, in other words, where the husband is in actual possession, holding a fee-simple title. But a man cannot become tenant by the courtesy, unless the wife be seized in deed. It is not material to dwell on the reason for the difference. As then Glenn was seized in law of an estate in fee simple, in the sixty acres, when the marriage existed, it conclusively follows that Mrs. Stevens is entitled to dower therein, unless the contract between Glenn and Smith, of 1805, and the delivery of the actual possession of the land to the latter, so operates as to destroy the right of Mrs. Stevens.

In the case of Winn, etc., *v.* Elliot's Widow, etc., Hardin, 482, it is said, "that before the statute of 27 Henry VIII, commonly called the statute of uses, the wife of the feoffee to uses was not to be endowed of the estate so held in confidence to the use of another, because the *husband* had no beneficial interest; and the wife of the *cestui que use* was not to be endowed, because there was no trust or benefit declared for her in the original grant. "The effect of the statute of uses was to con-

vert the interest of the *cestui que use* into a legal instead of an equitable ownership, and all the legal consequences of estates, dower amongst the rest, at once attached." Thus the marital rights of women, by the operation of this statute of Henry VIII were so enlarged as to entitle them to dower in estates conveyed for uses. How this statute was evaded by the scruples of the common-law Judges, notwithstanding the comprehensive terms used, and how *trusts* followed *uses*, are matters explained by Blackstone in his 2d vol., 335.

The doctrine in relation to dower in trust estates, at the common law, is well settled by numerous adjudications. A woman could not be endowed of a trust estate. See the English authorities referred to in note 183, on 1 Institute. See, also, the case of *Claibourn v. Henderson*, 3 Hen. & Mun. 322, and likewise the case of *Bailey and Wife v. Duncan's Representatives*, etc., 4 Monroe, 261, as well as that of *Winn, etc., v. Elliott's Widow*, already referred to. To impart to trust estates a dowable quality was an object of the Virginia Legislature as early as 1785.

In 1796 our Legislature re-enacted the provisions of our parent State on this subject. See the 14th section of the Act, 1 Digest, 315.

Thus the provisions of these statutes have changed the law of dower in respect to trust estates. But it is important to notice that these statutes do not give the wife of the trustee a right of dower in the trust estate. It is the husband or wife of the *cestui que use*, or *cestui que trust* alone, who by virtue of the statute shall have, and hold, courtesy or dower in the use or trust estate. These Acts of Virginia and Kentucky place the wives of *cestui que trust* upon the same footing in respect to dower which the statute of the 27 Henry VIII effected in relation to *uses*. In the case of *Winn, etc., v. Elliott's Widow*, etc., the Court left the question open, whether a wife was entitled to dower in an inchoate estate, not reduced to a legal one during the coverture. This question fairly presented itself in the case of *Bailey and Wife v. Duncan's Representatives*, and was settled in favor of the wife's right.

The Court use this language :

"In deciding upon the question under consideration, the main and only inquiry for the Court is to ascertain whether or not it was intended by the makers of the Act (to wit, that of 1797) to authorize a wife to recover dower in lands to which the husband had, at his death, an indisputable right in equity to a conveyance of the fee-simple estate, though the right be derived under an executory contract for the title, and not resulting from any use or trust expressly declared by deed. With respect to trusts of the latter sort, the provisions of the Act are too explicit in favor of the wife's right to admit of a difference of opinion ; and if we advert, as we should do, to the old law as it stood at the passage of the Act, the mischief which must have actuated the Legislature in making the change, and the remedy which the Act has provided, we apprehend but little doubt will be entertained as to the propriety of giving such a construction to the Act as will embrace all trusts, whether expressly declared by deed, or resulting from executory contracts by construction of Courts of Equity."

An application of this doctrine would give the wife of Smith, if he had one, and if he had died between the date of his title bond in 1805 and his deed in 1807 a right to dower in the sixty acres of land.

Glenn's obligation was for an unconditional conveyance of the title. He was bound by the terms of his obligation to make the conveyance presently. In equity, therefore, he was the trustee, and the mere title-holder for Smith's use. Smith's wife was entitled to dower under the statute in this trust estate, resulting from the executory contract. The same principles which convert this estate into a trust, so that the statute operates upon it in favor of Smith's wife, brings the case within the influence of those doctrines of the law which exclude the right of the trustee's wife to demand dower. Here then, before Mrs. Stevens' intermarriage with Glenn, he had, by a contract, entered into upon ample and valuable consideration, become in equity the trustee and legal title-holder for Smith's use, and thereby placed himself in a situation in which the prop-

erty, so held by him in trust, could not thereafter be incumbered by the dower-claim of any woman he might marry. For, as already remarked, the law excluding the dower claims of the wives of mere trustees was not altered by the statute so as to better their condition.

The wives of *cestui que trust* alone, were benefited by the change.

It is worthy of remark that the equity of Smith, founded upon an executory contract originated before Mrs. Stevens married Glenn. From the face of Glenn's bond for a title he ought to have made the conveyance before his marriage. Equity often considers that as done which ought to have been done.

Glenn could have had no pretext for withholding the title, unless it might have been to secure the payment of the purchase-money. It does not appear that any lien on the land for that purpose existed. If it did appear, such a lien could not be regarded as a beneficial interest, coupled with the title, so as to give Mrs. Stevens a right of dower. It would be no more than the attitude of a mortgagee, who holds the title to secure his debt without conferring on his wife a right to dower.

It is laid down by Coke, 1 Institute, 316, that "a woman shall not be endowed by a seisin for an instant." This Court, in the case of *Tevis v. Steele*, 4 Monroe, 340, considering this doctrine with great propriety, in our opinion, lay more stress upon the nature of the interest than upon the duration of the seisin.

Looking to the true nature of the interests of the respective parties in the present case, under all the circumstances, it seems to be in conformity to the principles of equity, and the adjudged cases, to regard the beneficial seisin, which once existed in Glenn, as avoided by his executory contract with Smith, and the estate invested into a trust, of which Glenn's wife, now Mrs. Stevens, cannot be endowed; but in which Smith's wife, under the statute, might claim dower. Had Mrs. Stevens been the wife of Glenn at any time, when he

was beneficially seized, the law and justice of the case would have been for her.

As these facts are, the decree is affirmed with costs.

**The widow has dower in fees-simple, fees-tail, in limitations, and in estates upon condition.**

HOUSE *v.* JACKSON,  
Court of Appeals, New York, 1872.

50 N. Y. 161.

PECKHAM, J. The statute declaratory of the common law enacts that a widow shall be endowed of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage: 1 R. S. 740, § 1.

It is not necessary that the husband should have been seized of a fee simple absolute, to enable the wife to have dower. If he was seized of an estate in tail male, or of the heirs of his body, she shall have dower: Lit., § 53, 40, *a*; Com. Dig., title Dower, A. 6.

"Thus, generally, in every case where the issue which the husband may have by his wife by possibility may inherit, his wife shall be endowed:" Com. Dig., title Dower, A. 6; Park on Dow. 79; Perk., § 301; Lit., § 52.

So, where the husband is seized of a base or conditional fee, or of a fee with a determinable quality attached to it, she has dower.

The dower will attach subject only, when the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband: Park on Dow. 49; Ib. 37.

So, if the husband have a defeasible estate in fee tail, his wife shall be endowed till his estate be defeated: Com. Dig. Dower, A. 6, and cases cited.

So, her dower terminates, if the conditional or base fee be ended, and the grantor enter for condition broken: Beardslee *v.* Beardslee, 5 Barb. 324.

"The seisin must be of an estate of inheritance, conferring the right to the immediate freehold, as the result of one entire limitation, or several consolidated limitations :" Park, 47.

Seisin of a vested remainder is not sufficient to give dower. So plain a point is decided in this Court : *Durando v. Durando*, 23 N. Y. 331.

I see no objection to the merger of this life estate of John Jackson, the father, in the vested remainder of his son, the husband of Mary L. Jackson, under the decision of *Moore v. Littel*, 41 N. Y. 66. This is a part of the same estate there adjudged. If the son should die in the lifetime of the father, I think the better opinion is that the estates divide again, and the widow is then not entitled to dower.

*Moore v. Littel* holds the estate of the son, prior to the death of the father, to be a vested remainder ; the son was also seized in fact and in law of his father's life estate, and then became seized of the inheritance, subject to being defeated by his own death, prior to the decease of his father. In such case I think the wife has dower, subject to being defeated by the same means. The plaintiff claims that the sale of the son's life estate upon execution cut off his title.

It is a settled rule of the common law, laid down in the elementary books, that after dower has once attached, it cannot be extinguished or suspended by any act of the husband alone, in the nature of alienage or charge : Park, 191.

The rule is adopted in much broader language in our statute : 1 R. S. 742, § 16.

At common law there might have been an intermediate estate for years and yet the wife had dower—as estates for years were not highly regarded at common law. But *cessit executio* during the term : Com. Dig. Dower, A. 6; Perk., § 336.

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life (Ib.), though the surrender be upon condition, for the estate is gone until the condition be broken : Ib.

In this case there is no intervening estate. The husband is seized of the life estate in fact and in law, and he is also seized

of a vested remainder as adjudged, subject to be defeated of the remainder by his death prior to that of his father.

This is such a seisin as prevents the alienation of the estate or its incumbrance, to the prejudice of the wife's dower. In other words, dower attaches to such an estate, subject to be defeated as above stated, and as the husband survived the father, her dower becomes absolute. The decree must be modified according to these views, with costs to her—no costs to either of the others, and the cause remitted for further proceedings.

Judgment modified in accordance with opinion, and affirmed as modified.

Divorce *a vinculo* bars dower: *Whitsell v. Mills*, 6 Ind. 229; *McCraney v. McCraney*, 5 La. 231.

By statute in some States dower is preserved if the divorce was granted on the ground of the husband's misconduct: *Gould v. Crow*, 57 Mo. 200; *Schiffer v. Pruden*, 64 N. Y. 47; *Harding v. Alden*, 9 Me. 140; Gen. St. Minn. 1878, c. 62, § 24; *Holmes v. Holmes*, 54 Minn. 352 (56 N. W. R. 46).

Divorce *a mensa* does not bar dower: *Clark v. Clark*, 6 Watts & S. 85; *Gee v. Thompson*, 11 La. An. 657.

No dower in partnership property till partnership debts are paid: *Simpson v. Leach*, 86 Ill. 286; *Young v. Thrasher*, 21 S. W. R. 1104; Gen. St. Minn. 1878, c. 62, § 30.

Usual method of barring dower is by deed: *Elmendorf v. Lockwood*, 57 N. Y. 322.

c

**Courtesy and Dower as Modified by Statute.**

**Some States have abolished and others have greatly modified the life estates of courtesy and dower.**

IN RE RAUSCH,  
Supreme Court of Minnesota, 1886.  
35 Minn. 291.

MITCHELL, J. Assuming the instrument (Exhibit A) to be in terms sufficient, if valid, to effect such a result, the question in this case is whether a married woman can, by contract with her husband, release and relinquish to him her incipient or in-

choate interest as wife in his real estate, so as to exclude her, as widow, from dower. We use the term "dower" because although "dower," strictly so-called, no longer exists in this State, yet the provisions of the present statute for the widow in the real estate of her deceased husband are rather in the nature of an enlargement than an abolition of dower, and this inchoate right, under the statute, is of the same general nature as the inchoate right of dower at common law. It was a well-established rule of the common law that a wife could not relinquish her dower in the real estate of her husband by executing a release to him: 2 Scrib. *Dower*, 309. It is true that in equity deeds of separation of husband and wife, made through the agency of a trustee for the wife, would be enforced if their object was actual and immediate, and not contingent or future separation, and, if so provided in them, might exclude her from dower and distribution in her husband's estate: *Cord, Rights Marr. Wom.*, § 114 *a, et seq.* But, whatever may have been the rule in equity, the power of the wife, even by a deed of separation, to release to her husband her inchoate statutory right in his real estate is excluded in express terms by the statute, which declares that "no contract between a husband and wife, the one with the other, relative to the real estate of either, or any interest therein, shall be valid." Gen. St. 1878, c. 69, § 4. The inchoate interest of the wife in the real estate of the husband, while it is not an estate, or even a vested interest, yet is a valuable, although contingent, interest in real estate, and a release of it is "a contract relative to an interest therein," within the meaning of the statute.

As the husband died testate as to all his property, his widow would not, in any event, be entitled to any allowance or distributive share out of his personal property: Gen. St. 1878, c. 51, § 1; *Johnson v. Johnson*, 32 Minn. 513 (21 N. W. Rep. 725). Hence it becomes unnecessary to consider whether this release would have excluded respondent from distribution had her husband died intestate.

The judgment of the Court below must therefore be affirmed wherein it adjudges respondent entitled to an assignment of

her statutory rights in the real estate, but reversed wherein it adjudges her entitled to the statutory allowance out of the personal property of her husband.

Ordered accordingly.

But see *Scott v. Wells*, 56 N. W. Rep. 828. Dower may be regulated by statute: *Morrison v. Rice*, 35 Minn. 436. The inchoate interests of courtesy and dower cannot be divested by a sale on execution issued against the husband's lands: *Dayton v. Corser*, 51 Minn. 406. "Dower" construed: *Holmes v. Holmes*, 54 Minn. 352.

d

**Homestead.**

A legal life estate is created in the homestead by statute in some States in behalf of the husband or wife, as the case may be. In Minnesota it arises as follows: "If there be a child or the issue of any deceased child living, and a surviving husband or wife (the homestead shall descend), to such husband or wife during the term of his or her natural life, remainder to the child or children and the issue of any deceased child by right of representation": Minn. Probate Code (1889), § 63.

This life estate vests at the instant of the death of the husband or wife.

**WILSON v. PROCTOR,**

Supreme Court of Minnesota, 1881.

28 Minn. 13.

**MITCHELL, J.** This cause comes up on appeal from an order of the District Court, reversing, in part, an order of the Probate Court, and allowing the two items in the administrator's account hereinafter referred to. From this order, allowing these items, the heirs appeal to this Court.

The facts were all stipulated upon the trial in the Court below, and are as follows: "That the house occupied by Mary Wilson, the widow of the deceased, was the homestead of the said deceased at the time of his death; that the same, and the lots pertaining thereto, were occupied by his said widow continuously, from and after his said decease, as such homestead, by virtue of being the widow of deceased, without objection

on the part of any one; that the real estate pertaining to said house consisted of three lots of a certain block in the city of Stillwater, lying side by side, each lot being 50x150 feet, and forming a tract one hundred and fifty feet square; that said house is situate in part upon each of these lots; that no particular part of said lots had been selected by said widow or set apart by the Probate Court as belonging or appertaining to said house, and as comprising with it said homestead. . . . The item of \$30.55 was paid by the administrator for repairs of fence around said lots, made by him after the death of the deceased; that the item of \$266.64 was for three years' taxes upon said house and lots, accruing after the death of the deceased." These items of \$30.55 and \$266.64 are those from the allowance of which this appeal is taken.

From this state of facts it is clear that the widow had a homestead right in these premises, to the extent of the house and a quantity of ground on which the same was situate, not exceeding in amount "one lot," the premises being situated in the laid-out or platted part of a city containing over five thousand inhabitants. The duty of paying taxes and making repairs upon this homestead, during the continuance of the homestead right, devolved upon the widow, and not upon the estate of the decedent. This duty the law always imposes upon the person who has such present interest or estate in real property as entitles him to enjoy the use and occupation, and to receive the rents and profits of the estate. The case of a tenant of an estate for life is an illustration of the application of this doctrine almost too familiar to require the citation of authorities: 1 Washburn, Real Property, 97; Hilliard on Taxation, c. 6, § 24 *a.* But it was argued that, inasmuch as the widow had made no informal selection of a homestead, and no decree had been made by the Probate Court assigning a homestead to her, therefore she had no *vested* right or estate to or in any part of this tract, and that, until this was done, the whole remained assets of the estate in the hands of the administrator; therefore, it was his duty to pay taxes upon the whole property, and to keep it in repair.

We think this is a mistaken view of the nature of the homestead right, and of the method of dedicating land as a homestead under our laws. We do not think that the homestead right of the widow or family of a decedent is dependent or contingent upon any formal act of selection on their part, or upon any order or decree of any Court assigning it to them. Whatever may be the law in some States, under different statutes, it seems to us that under our statute the method of dedicating land as a homestead is by visible occupancy and use: *Barton v. Drake*, 21 Minn. 299; *Ferguson v. Kumler*, 25 Minn. 183; Thompson on Homesteads and Exemptions, § 231. The date of the occupancy of the land is the date of homestead right. The purpose of a selection by the widow or family, or of an order of the Probate Court setting apart a homestead to them, is not to vest title in her or them, for that is already done by law. The only object of such selection or order is to determine whether there is any excess which may be the subject of administration, and to ascertain the exact boundaries or limits of such excess. The homestead right of a widow or minor children is no new right or estate. They have no general right of selection out of the whole body of the decedent's property. Their right is simply a transmission to them, or continuance in them, of the same right previously vested in the decedent and his family at the time of his death. The right vested in the widow at the instant of the death of her husband, without any act of selection on her part, or order of the Court, although one or both of these might be necessary to determine the precise boundaries of the homestead, where it was a part of a tract larger than the quantity allowed by law. The homestead, therefore, never becomes, even for an instant, a part of the estate of a decedent for the purposes of administration, so long as the homestead right continues.

In the present case there was vested in the widow, by virtue of the visible occupancy and use thereof by herself and husband before his death, and by herself after his death, a homestead right or estate in this tract of land to the amount of one lot, upon which it was her duty, and not that of the estate, to

pay taxes and make repairs. True, she was occupying, under the claim of a homestead right, more land than she was by law entitled to; for it appears that this property was situated within the laid-out or platted portion of the city of Stillwater, which, it was admitted upon the argument, had more than five thousand inhabitants. The homestead in such case is limited to a quantity of land not exceeding in amount one "lot." The word "lot," as used in our statute, evidently is not to be understood as synonymous with the words "tract" or "parcel," but in the sense of a city, town, or village lot, according to the survey and plat of the city, town, or village in which the property is situated.

This construction of the statute is not free from difficulty, but it is in accordance with the manifest intention of the Legislature, and seems to be the only construction that is practicable or reasonable. But in such case it was the duty of the administrator, if he desired to assert his right to the remainder of the tract for the purposes of administration, to call on the widow to designate, by selection, the boundaries of her homestead, or take some other steps to have the boundaries of her homestead determined and fixed, so as to ascertain what part of the tract he was entitled to the possession and control of as administrator. But, instead of so doing, he allows the widow to enjoy the use of the whole tract, and then applies the personal assets in his hands to make repairs and pay taxes upon the entire property. The manifest injustice of this to the next of kin, to whom the personal estate of the decedent belonged, points pretty conclusively to the conclusion that the course adopted by the administrator in this case was not the correct one.

Whether, under the circumstances, the administrator might not, with the consent of the next of kin or creditors, or under the direction of the Probate Court, be authorized to make repairs or pay taxes upon the homestead, when such becomes necessary, owing to the default of the occupants to save the reversionary interest of the estate from waste or forfeiture, we do not now determine. No such supposed state of facts is

made to appear in this case. Neither is it necessary to consider whether, in the present case, the administrator might not, under a proper showing, be entitled to be allowed a certain portion of the moneys thus expended by him, for the reason that the facts, as stipulated, furnish no basis for any such apportionment.

We are, therefore, of opinion that these two items contained in the administrator's account ought not to have been allowed. Ordered, therefore, that the cause be remanded to the District Court, with instructions to modify its order or judgment in accordance with this opinion.

## 3

## INCIDENTS OF ALL LIFE ESTATES.

## a

## Estovers.

Every tenant for life, or his personal representative, is entitled to reasonable estovers, such as wood from the land for fuel, fencing, agricultural erections and other necessary improvements.

WHITE v. CUTLER,  
Supreme Judicial Court of Massachusetts, 1835.

17 Pick. 248.

SHAW, C. J., delivered the opinion of the Court. The question in the present case, is whether a tenant in dower or her lessee has a right to cut wood upon the dower estate, for sale, to be removed and not used or consumed upon, or in connection with the estate.

We think that a reference to a few principles, which have been adopted and acted upon in decided cases, in our own State, will lead to a satisfactory decision of this question.

It was in effect decided in Sargent v. Towne, 10 Mass. R. 307, that a tenant for life has no right to cut growing trees, that such cutting would be waste, and that wild and unculti-

vated land cannot be deemed estate yielding annual rents or profits.

In the case of *Conner v. Shepherd*, 15 Mass. R. 164, it was decided that in this Commonwealth a widow is not entitled to dower in wild and uncultivated lands, held separately and distinct from houses, cultivated lands and other improved estate, first, because they yield no annual profit, and secondly, because the widow could not make the only beneficial use of them, of which they are capable, without committing waste and forfeiting the estate. These reasons apply as well to the case of a wood lot situated in the midst of a cultivated country, as to forest lands in their original state. But the Chief Justice, in delivering the opinion of the Court in this case, takes care in terms to limit its operation to the case of woodlands not used or connected with a cultivated farm, or other improved estate.

In the case of *Webb v. Townsend*, 1 Pick. 21, the general rule, that a widow is not dowable of wild lands, is confirmed, and it was placed more distinctly upon the ground that as a widow is to be endowed, not according to the value of the land, but according to the value of the annual rents and profits, and as uncultivated lands yield no rents and profits, dower therein would be nugatory and of no value.

But in a subsequent case, *White v. Willis*, 7 Pick. 143, it was held that a lot of wild land, which had been used by the husband in connection with his house and cultivated land, to supply wood for buildings, fences, and fuel, might be properly assigned to a widow as part of her dower, to enable her to take fuel and timber for repairs. It was also suggested, that a widow would have no right to take firebote, etc., from lands of her deceased husband, unless the land, from which it is taken, were included in those assigned as her dower.

A distinction was urged in the argument, between woodlands, kept by the owners to raise wood for sale, for purposes of profit, and wild lands, and that it would be hard to deprive a widow of her dower in such lands, of which the raising of wood for sale may be considered as the most profitable use.

But we think the answer results from the legal principles on which the foregoing cases are settled. Such estate yields no annual profit. The owner may make a profit of the land, but it is in the exercise of the rights of a tenant in fee, which a tenant for life, by law, does not enjoy, that of felling growing trees. The result we think is that a widow is not to be endowed of a lot of growing wood and timber, although kept purposely to raise wood and timber as objects of profit, provided that it is not assigned to her as part of her dower, in connection with buildings or cultivated lands. But when woodland is so connected and used, it may be included in the assignment of dower, to be used and enjoyed by the widow, or those holding under her.

But the right of the widow thus acquired is that of reasonable estovers, under which may be included firebote or the necessary fuel for the supply of the dower estate. But this right of reasonable estovers is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used and consumed upon the estate, or for purposes connected with its proper use, occupation, and enjoyment. It has been recently decided that cutting growing trees, to be exchanged for other wood to be used as fuel or timber on the estate, was not within the right of a tenant in dower, but in law was deemed waste: *Padelford v. Padelford*, 7 Pick. 152.

*A fortiori*, the cutting of wood for sale, the proceeds of which are not to be used or appropriated upon the estate or in connection with it, is not admissible, under the limited right of taking reasonable estovers.

If the plaintiff, as lessee of the tenant in dower, had no right to cut the growing wood, the defendant, as having the next estate of inheritance, had a right to take the wood when severed: *Blaker v. Anscombe*, 4 Bos. & Pul. 25.

Plaintiff non-suit.

*Webster v. Webster*, 33 N. H. 18. The life-tenant cannot commit waste simply because his necessities require more than the regular rents and profits of the land: *Robertson v. Meadors*, 73 Ind. 43.

## b

**Emblements.**

**Such tenant is entitled to the growing crops which he has planted, if his life estate terminates before the harvest and after sowing, unexpectedly and without his fault; but it extends only to *fructus industriaes*, and extends to sub-leases.**

**REIFF v. REIFF,**  
**Supreme Court of Pennsylvania, 1870.**  
**64 Pa. St. 134.**

**READ, J.** The plaintiffs in error were the lessees of a farm of 152 acres, from their mother, a widow, who had a life estate in it under the will of her husband, their father. They were annual lessees from the 1st April, 1866, 1867, and 1868, the widow dying on the 15th June, 1868. At the time of her death, there was standing uncut on the premises, a quantity of mixed timothy and clover grass, a quantity of grass, part meadow and part timothy, and a quantity of timothy exclusively. The question was, was this grass *emblements*, belonging to the tenants of the deceased owner of the life estate. The vegetable chattels called *emblements* are the corn and other growth of the earth which are produced annually, not spontaneously but by labor and industry and thence are called *fructus industriaes*. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements: because as it is said the improvement is not distinguishable from what is natural product, although it may be increased by cultivation: 1 Williams on Executors, 670, 672.

The learned Judge in the Court below is a practical farmer, thoroughly acquainted with the established usages of our State, and we have no hesitation in agreeing with him that this crop of hay was not emblements, and belonged to the executors of the testator.

Judgment affirmed.

**Stewart v. Doughty**, 9 Johns. 108; **Fobes v. Shattuck**, 22 Barb. 568; **Chesley v. Welch**, 37 Maine, 106. The tenant has a right to enter and take his crops: **Forsythe v. Price**, 8 Watts, 282.

## C

**Duties of Life-Tenants.****Interest.**

**The life-tenant is to keep down interest on incumbrances, but is not chargeable with the principal.**

THOMAS *v.* THOMAS,  
Court of Chancery, New Jersey, 1866.  
17 N. J. Eq. 356.

BEASLEY, C. J. The only controversy in this case is that which has arisen between the defendants, and it is one in which the complainant has no interest. It appears upon the answers which have been filed, and, although it is thus presented in a form somewhat irregular, an opinion will be expressed on the points which have been argued, as by this course the necessity of further litigation may be avoided.

The object of the suit is to foreclose a mortgage. Luther S. Thomas, who was the mortgagor, by his will, devised the mortgaged premises to the defendant, Lemuel Thomas, on condition that he would permit the other defendant, William H. Stanford, to carry on the business of a druggist, in a certain part of the premises then occupied by him, so long as he might desire to use it for that purpose, at an annual rent, not to exceed \$100, it being expressly provided that this privilege should be personal, and should not extend to his representatives or assigns. The testator then bequeathed to Mr. Stanford the stock and fixtures in the drug store above mentioned, and also all money standing to his credit in the Mechanics' Bank, at Newark, on condition that he should pay all the testator's debts, for which he was liable on account of said stock in the business of said store. By subsequent clauses, divers specific legacies are given to various persons, and the residue of the estate to one of the brothers of the testator.

The questions discussed before me relate to the proper mode of marshaling the assets of the estate according to equitable rules, in view of these testamentary dispositions.

It was insisted by the counsel of Lemuel Thomas, who is the devisee of the fee in the mortgaged premises, that the residuary estate, in the first place, must be applied in payment of the mortgage debt; and that, as that will not be sufficient, the specific legatees must contribute *pro rata* with the mortgaged property to discharge the residue of such debt. The argument urged in support of this position was that the bond and mortgage in question had been given by the testator himself, and that consequently this represented a debt due from him by specialty, and that it was the well-settled rule that in such cases, upon exhaustion of the residuary fund and the pecuniary legacies, the specific legacies and the land devised, when there is neither land charged with debts nor land descended, must bear the burden in the ratio of their respective values. In support of this proposition various authorities were cited which fully sustain it.

But the rule thus contended for and established does not apply in the present instance. There is a circumstance in this case which did not exist in those recorded in the authorities referred to. They belonged to the class of cases in which the debt secured by specialty had not been imposed by the testator himself on any part of his estate, and under such conditions undoubtedly the rule above propounded obtains. But when there is a specific lien on the real estate devised, as in the case now before me, a different principle of distribution is introduced. If this debt of the testator existed in the shape of a bond, it would have been no lien on any part of the estate; but if the holder of such specialty had proceeded to enforce his claim, after the exhaustion of the personal assets, which would, of course, be the primary fund, and had proceeded to raise the residue out of the real estate, in such case a clear right in equity would have supervened in the devisee to call upon the specific legatees for a ratable contribution.

In such an attitude of rival interests, according to the established gradation of liability, the appropriation would be, first, the residuary fund; next, general pecuniary legacies; and then, *pari passu*, specific legacies and devised lands. This was

the order of contribution recognized and acted upon in the case of *Shreve v. Shreve*, decided in the Court of Appeals of this State, in the Term of June, 1864. But the distinction is between the mere general right of the holder of a specialty debt to levy it at his pleasure on the real or personal estate, and the lien growing out of such debt, imposed by the testator himself upon the land. In such event, the doctrine has been long established that after the application of the general residue of the estate, the land thus incumbered must solely bear the burden. By force of such a testamentary disposition the devisee of the incumbered land cannot disappoint either the specific or general legatees.

The early decisions in which this rule is propounded and applied are those of *Lutkins v. Leigh*, *cases tempore Talbot*, 53, and *Forrester v. Leigh*, *Ambler*, 171. And in more modern times the rule has often been received as of unquestionable obligation, both by text writers and in judicial opinions: 2 Roper on Leg. 957; 2 Williams on Ex'rs, 1453; 2 Jarman on Wills, 428, and the cases cited.

In the case in hand, therefore, in my opinion, that part of the estate of the testator which is comprehended in the residuary clause of the will, must be first taken and applied to the payment of the debts, including the claim of the complainant, and the residue of such claim must be paid out of the mortgaged property. For the payment of this debt, the specific legatees cannot be called upon to contribute.

The counsel of the defendant, Lemuel Thomas, further insisted on the argument that the interest of Mr. Stanford in the mortgaged land must be held liable, proportionately, for payment of the complainant's demand.

There appears to be no room for doubt on this point. The will gives this defendant the right to enjoy a part of the mortgaged property, paying a rent, the maximum of which is designated, as long as he may desire to use it as a drug store. This gives Mr. Stanford a freehold interest in the premises; his estate is deemed, in law, one for life: 1 Washb. on Real Prop. 88. One of the incidents of such an estate is that the

tenant must keep down the interest of the incumbrances on the property enjoyed by him, but he is not forced, as between himself and the reversioner or remainderman, to pay off the principal of any moneys charged upon it. And it is also equally clear that if he is obliged to take up, or his estate is taken to pay off the principal of such an incumbrance, he will become a creditor of the estate for the amount so paid, deducting the value of the interest he would have to pay during his life. See the rule as stated by Judge Story, 1 Eq. Jur., § 487.

But this and the other question discussed are aside from the purpose of this suit. The proper parties are not before the Court to authorize the marshaling of the assets.

The only decree, therefore, which can be rendered, is the ordinary one for the foreclosure and sale of the mortgaged property; and I shall consequently advise the Chancellor to make that decree.

The doweress is chargeable with only one-third of the interest: *Swaine v. Perine*, 5 Johns. Ch. 482.

#### Taxes.

**The life-tenant must pay the taxes.**

**VARNEY v. STEVENS,**  
**Supreme Judicial Court of Maine, 1843.**

22 Me. 331.

SHEPLEY, J. The last will of Jonathan Varney, deceased, contains this clause: "My will is that my said wife Dorothy Varney shall have the whole of my estate, real and personal, during her natural life." The general rule is that a devise of lands without words of inheritance gives only an estate for life. If the devise be accompanied by a personal charge upon the devisee, it is indicative of an intention to give a fee. And it has been decided that a devise of uncultivated lands, without words of inheritance, gives a fee. In this case there was no

personal charge imposed upon the devisee, and there was an express limitation of the devise by the words "during her natural life." And the introductory words, "as touching my worldly estate," "I give, demise, and dispose of the same in the following manner and form," cannot be considered as exhibiting an intention to give a fee in contradiction of the express limitation: *Crutchfield v. Pearce*, 1 Price, 353.

The tenant offered certain deeds, showing a sale of the premises by a collector of taxes, and a release of that title to himself. If it had been admitted, he would have taken under such a release according to his title; and the reversioners according to theirs. "A release of a right, made to a particular tenant for life, or in tail, shall aid and benefit him or them in the remainder:" Co. Lit., § 453 and 267, b.

It was moreover the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioners. And when he received a release of the title, if any were acquired under that sale, he would be considered as intending to discharge his duty by relieving the estate from that incumbrance. To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners, would have been to commit a fraud upon their rights. This is not to be presumed. On the contrary he must be presumed to have intended by procuring that release to extinguish the title under that sale.

Having a legal right to the possession of the estate during the life of his wife, he is to be considered as occupying according to his legal rights, and not as a wrongdoer. "His possession is to be construed according to his rights:" *Liscomb v. Root*, 8 Pick. 376. He cannot therefore establish any title as a disseisor against the reversioner; and for that purpose only could the deeds offered have been received as evidence. To have established a title under them superior to that of the reversioner's, it would have been necessary to make some proof of the preliminary proceedings so far at least, as they were

to be derived from recorded and documentary evidence, even after such a lapse of time: *Blossom v. Cannon*, 14 Mass. R. 177.

As the tenant is considered as having during the life of his wife, occupied the estate according to his legal title, his possession could not be adverse to the title of the reversioners; and he cannot be entitled to claim "by virtue of a possession and improvement" under the statute, while he was thus occupying under a subsisting and valid title.

Judgment on the default.

*Reyburn v. Wallace*, 93 Mo. 326. But extraordinary assessments are to be borne ratably between the life-tenant and the remainderman: *Peck v. Sherwood*, 56 N. Y. 615. The tenant for life and the remainderman each pay insurance for their respective interests: *Kearney v. Kearney*, 17 N. J. Eq. 59; *Graham v. Roberts*, 8 Ired. Eq. 99; *Brough v. Higgins*, 2 Gratt. 408.

**Waste.**

**The life-tenant must not commit waste.**

KEELER *v.* EASTMAN,  
Supreme Court of Vermont, 1839.

11 Vt. 293.

BENNETT, Chancellor. The great subject of complaint seems to be the destruction of the sugar orchard, which it is alleged has been cut down and destroyed since the orator became possessed of the reversionary interest, in February, 1832. It is unnecessary to go into the particulars of the evidence, which is quite voluminous, and is evidently somewhat contradictory; but suffice it to say that it seems to be pretty well established from the current of the testimony, that the principal part of the chopping in the sugar orchard was prior to the winter of 1832, and this too by Seba Eastman and Charles Eastman, while Seba had the reversionary interest. The whole evidence taken together satisfies the Court that the farm, on the whole, has been managed by the tenant for life in a prudent and husbandlike manner; and that there have been no acts of

wantonness on the part of the defendant, or disregard to the ultimate value of the reversionary interest. Indeed, the value of the property seems to have been enhanced by the betterments and good husbandry of the defendant. We are not aware of any decisions in the Courts of this State, laying down any precise rules establishing what acts shall constitute *waste*; and, indeed, it is difficult there should be any. The general principle is that the law considers everything to be *waste* which does a permanent injury to the *inheritance*: Coke Litt. 53, 54; Jacob's Law Dic. 6 Vol. 393, Tit. Waste; 6 Com. Dig. Tit. Waste.

By the principles of the ancient common law, many acts were held to constitute waste—such as the conversion of wood, meadow, or pasture into arable land, and of woodland into meadow or pasture land—to which we might not, at the present day, be disposed to give that effect. These principles must have been introduced when agriculture was little understood, and they are not founded in reason, and many of them are inconsistent with the most important improvements in the cultivation of the soil. In England that species of wood which is designated as timber shall not be cut, because the destruction of it is considered an injury done to the inheritance; and, therefore, *waste*. From the different state of many parts of our country a different rule should attain in our Courts; and timber may and must, in some cases, to a certain extent, be cut down, but not so as to cause damage to the inheritance. To what extent a tenant for life can be justified in cutting wood, before he shall be guilty of *waste*, must depend upon a sound discretion applied to the particular case. It is not in this State *waste*, to cut down wood or timber, so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm. So, to remove the dead and decaying trees, whether for the purpose of clearing the land, or giving the green timber a better opportunity to come to maturity, is not *waste*. We are satisfied that, when the wood or timber is cut with this intent, and is according to

a judicious course of husbandry, the tenant is not guilty of waste, though the wood or timber so cut may have been sold, or consumed off of the farm. This farm, it is to be remembered, is comparatively in a state of nature, and the town in which it is situated comparatively new; and what might constitute *waste*, as applied to one farm in one place, might not, when applied to another, in a different place.

Though the evidence is somewhat contradictory, we are not satisfied that the defendant has gone beyond his rights. The orator's bill is therefore dismissed. But inasmuch as the defendant has made declarations claiming the right to cut off all the wood and timber from the farm if he chose to do it, and threatened the doing of it, the bill was not brought without some apparent cause, and the defendant in this particular is not without fault; it is, therefore, dismissed without costs.

Sackett v. Sackett, 8 Pick. 309.

## II

## ESTATES LESS THAN FREEHOLD.

## A

## ESTATES FOR YEARS.

An estate for years is an interest in lands or tenements created by contract, whereby the tenant is to have possession of the premises for a fixed and definite period.

An estate for years is an interest in land, but this interest is treated for many purposes as a chattel.

BREWSTER *v.* HILL,  
Supreme Court of New Hampshire, 1818.

1 N. H. 350.

John Wheelock owned certain lands in 1776, and leased them to O. for the term of 985 years. O. entered the lands and died, leaving a will wherein he bequeathed all his "personal estate" to A., who conveyed his interest to the plaintiff. Plaintiff now brings ejectment to recover possession of the premises, and the question is: Did the term pass under the will as "personal estate"?

WOODBURY, J., delivered the opinion of the Court.

In this case the sole question is, whether the term mentioned in the plaintiff's writ would pass under a devise of "personal estate."

The boundaries between real and personal estate are, in certain instances, scarcely distinguishable; and indeed some species of property exist, which have been deemed real or personal, according to the character of the claimants, and the purpose for which they claim: *Vide* autho. cited *post* Mills *v.* Pierce, Rock. February, 1819.

But we are not aware of any established principles or precedents, which would make leases for years anything more than

"personal estate." The law in relation to them was settled before the land itself could be conveyed. They were then for short terms, and with an exclusive view to aid great land-holders in the cultivation of the soil. Hence the lease passed to the lessee no interest in the premises ; but was a mere contract, for a breach of which a recovery in damages against the lessor was the only remedy.

As the custom altered and leases for longer terms became common, the remedy of the lessee was by statute extended, and he was enabled to protect himself in the occupation of the land itself.

Yet all the incidents of a mere chattel were still attached to the term—whether its continuance was for one or for a hundred years. Livery of seisin was not necessary to pass the interest as it was to pass real estate. The lessee could not sustain a real action ; but when ousted was obliged, as this plaintiff has been in this instance, to resort to trespass in ejectment. Nor could a real action be maintained against him ; because he was not the owner of the realty and could plead *non tenure*. His interest could be devised, though at common law no real estate would pass by a will. It has always been held, too, that after the decease of the lessee, the term belonged to his executors or administrators, and not to his heirs.

Under statutes creating a lien upon the real estate of a debtor from the time of judgment rendered, leases for years have been decided not to be embraced. In wills, too, as in the present case, they have always passed under the expression "goods and chattels," and in some instances under that of "goods" alone. Nor is it necessary, that leases should be acknowledged and attested ; as deeds must be that convey "lands and tenements :" Stat. 191.

But we are well aware of a common impression that long terms are "to all imaginable purposes a fee-simple estate ;" that a power "to sell land" has been held to be duly executed by leasing it for nine hundred and ninety-nine years ; that our statute of February 10, 1791, requires all leases for more than seven years to be recorded—and that according to Denn *v.*

Barnard an adverse possession by the lessee, under a long term, might in time enable him to claim a fee.

On principle, however, it is impossible to define at what number of years a lease shall become real estate. Its character cannot be changed by the length of the term. Nor does our statute, or the decisions last cited, appear upon examination to conflict with the idea that a lease for any number of years, is not, as to the lessee's heirs, anything more than "personal estate."

Let judgment be entered on the verdict.

To same point.

MURDOCK v. RATCLIFF,  
Supreme Court of Ohio, 1835.  
7 Ohio, 119.

LANE, Judge, pronounced the opinion of the Court. The plaintiffs claiming to be the heirs of Andrew Murdock, *inheriting his realty*, pretend to be entitled, in that character, to an account and distribution of the personal estate; and while they ask the account against one defendant they pray to be quieted in their possession against the others. The bill is objectionable for its multifariousness, as it attempts to combine in the same suit claims against different classes of defendants between whom subsists no privity.

But passing over this objection their rights to the personal property have no existence upon this state of facts. The plaintiffs are the brothers and sisters of the decedent, and in the absence of legitimate issue inherit his real estate; but as he died, without children, the law, Statutes of Ohio, c. 29, 236, s. 28, gives the whole of the personality to the wife. Whatever then be the deficiencies of the administrator the plaintiffs have no interest in calling him to an account.

Their right to the college lot depends on the character of the estate which Andrew Murdock held in it; if it be not

inheritable their possession ought not to be protected. It was a lease upon an annual rent for ninety-nine years renewable forever. We know that such interests are usually treated as fees simple by the holders; that, in case of death, they are ordinarily transmitted to the heirs as realty without being accounted for by the administrator; that the law requires them to be appraised as real estate in sales under execution, St. c. 29, 103, s. 10; that such interests are liable to dower, St. 29, 250, s. 1; and perhaps it might be expedient for the Legislature to make them inheritable; but no proposition has been better settled, from the earliest days of the common law, than that a lease, of whatever duration, is but a chattel. In the absence of legislation it only remains for us to follow the current of authorities: *Bisbee v. Hall*, 3 Ohio R. 465; *Butler v. Cowles*, 4 Ib. 207.

The only statute we find upon this subject is contained in the "Act to establish the Ohio University:" Statute of Ohio, c. 6, 188, s. 10, which declares that the tenants or lessees shall enjoy and exercise all the rights and privileges which "they would be entitled to enjoy did they hold their lands in fee simple;" a provision designed, in our opinion, to secure to the tenants civil and political privileges; not to change the quality of their estates.

Counsel have argued this case upon another hypothesis: taking the lease to be a chattel, as the testator gave it to his wife for her life only, what remains after her life is not disposed of by will, but reverts to the testator to be distributed by his representatives. This doctrine when applied to chattels real, seems countenanced by the books: 6 Cruise, 287; *Forth v. Chapman*, 1 Peere Williams, 666; 1 Salk. 278. But our view of the case renders a decision unnecessary; if the estate of the widow was for life only, and a reversion substituted in the executors of the testator, subject to distribution, she was the executor and the distributee, and entitled to such reversion, and her rights became absolute, since the estate for life and the reversion met in the same person.

Bill dismissed.

## 1

## TERM.

To create an estate for years the *beginning and ending* of the term must be certain or capable of being reduced to certainty.

GOODRIGHT v. RICHARDSON,  
Court of King's Bench, 1789.  
3 T. R. 462.

A lease was made in 1785 for three, six, or nine years, determinable in 1788, 1791, or 1794, and it was held to be a lease for nine years, terminable in three or six years by either of the parties by giving reasonable notice to quit.

Lord KENYON, C. J. There is no doubt of what Lord MANSFIELD's opinion would have been in Ferguson v. Cornish, as to the validity of the lease beyond the first seven years. In these cases the intention of the parties ought to prevail, if it be not contrary to law. It is true that there must be a certainty in the lease as to the commencement and duration of the term, but that certainty need not be ascertained at the time, for if in the fluxion of time a day will arrive which will make it certain that is sufficient. As if a lease be granted for twenty-one years after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *id certum est quod certum reddi potest*, and such terms are frequently created for rating portions for younger children. Now in this case it is impossible to form any doubt respecting the intention of these parties. It was intended that this lease should take effect for three years, at all events, and that it should be in the election of either of the parties to put an end to it at that time, or at the end of six years, giving reasonable notice to the other. It is like a lease for a year, and so from year to year; where, if the lessee wish to determine it at the end of the year he must give reasonable notice to the other party. And though here either of the parties might have determined the lease at the expiration of the first three years, yet when the time elapsed, at which

notice ought to have been given for that purpose, the lease could not be determined till the end of the next three years. Consequently the lessor of the plaintiff is not entitled to recover.

ASHHURST, J. All that is required is either that the term should be certain in itself or reducible to a certainty. Now that is the case here, for it is for three, six, or nine years, as the case may happen, the parties having agreed that it should be determinable in the years 1788, 1791, 1794. It is therefore a lease for three years certain, or for six or nine years, unless the parties determine it sooner.

BULLER, J. This is a lease for nine years, determinable by either of the parties at the end of the first three or six years, for it is stated in the case that it is *determinable in the years 1788, 1791, 1794*. But if it were not determined at either of those periods the party first giving reasonable notice it was to continue for the nine years.

*Postea* to the defendant.

MURRAY v. CHERRINGTON,  
Supreme Judicial Court of Massachusetts, 1868.  
99 Mass. 229.

The terms of the lease are contained in the following letter:

"I hereby let you the whole of my house in Mercer Street, in South Boston, when said house is suitable to be occupied by you, for a rent of four hundred and eighty dollars per annum to me, paid in monthly payments, or otherwise *pro rata*, and will give you the privilege of reletting to a good party such a portion of it as you may wish to; but it is to be understood that, in case after two years subsequent to your moving into said house I should wish to live in the house myself, I can do so, and that then you may still retain, if you wish to do so, the second floor and front chamber and bedroom adjoining, for such a term as may be agreeable to us both."

FOSTER, J. 1. Upon very familiar principles, parol evidence was inadmissible to aid the construction of the letter from the plaintiff to the defendant, which was claimed to create a lease for years.

2. We are also of opinion that the ruling of the Presiding Judge was correct, that the terms of this letter did not create an estate for years—namely, a lease for two years—between the parties. The duration of a lease for years must be certain; this includes both its commencement and termination. It may be conceded that a lease for years may begin "when a house is suitable to be occupied," according to the maxim, *Id certum est quod certum reddi potest*. But the fatal objection remains that no period of termination is fixed by this letter. A leasehold interest for an uncertain and indefinite term is an estate at will only: SHAW, C. J., in *Cheever v. Pearson*, 16 Pick. 271; Bishop of Bath's Case, 6 Co. 35; Bac. Ab. Lease, L. 3. It is indisputable that an entry by the lessee under this instrument would not bind him to remain for any definite period. He could terminate his tenancy in the modes provided by statute. As to him, there is no term of certain duration. Consequently there can be none as to the landlord.

The proviso, that after two years from the commencement of the occupancy the landlord may live in the house if he wishes to do so, and that then the tenant may still retain, if he wishes, certain rooms, cannot change the construction. This clause has no tendency to show that the tenant was bound to remain during the two years.

Exceptions overruled.

1 Wood, L. & T. 74; *Horner v. Leeds*, 25 N. J. L. 106; *Lemington v. Stevens*, 48 Vt. 38; *Doe v. Needs*, 2 M. & W. 129. The word "term" designates the estate the tenant has, and is often used also to designate the duration of the interest: *Batchelder v. Dean*, 16 N. H. 265; *Doe v. Dixon*, 9 East, 15; *Wright v. Cartright*, 1 Burr. 282.

## a

**How created.**

An estate for years is created by *express* contract, technically called a lease, and may be for one or more years or for a shorter period; as, for months or weeks or days.

BROWN'S ADMINISTRATORS v. BRAGG,

Supreme Court of Indiana, 1864.

22 Ind. 122.

WORDEN, J. On the 1st of April, 1859, Brown let to Bragg certain real estate, to be held by the latter for the term of one year from that date; for which Bragg was to pay, as rent, the sum of \$450, to be paid quarterly, at times specified in the instrument of writing creating the tenancy executed between the parties. On the 1st of December, 1859, a quarter's rent being due and unpaid, Brown served on Bragg a notice to quit the premises at the expiration of ten days, unless the rent in arrear should be paid within that time.

Bragg failing to pay the rent or quit the premises, this action was brought by the representatives of the lessor to recover possession. The suit was brought before the expiration of the term.

The Court below held, on the facts above stated, that the plaintiffs were not entitled to recover, and we think the decision was in accordance with the law of the case.

We suppose that, independently of any statutory provisions, the proposition that the failure to pay the rent due, did not work a forfeiture of the estate of the tenant, is too clear to require the citation of any authorities in its support. In order that a failure to pay rent should work a forfeiture, it should be so expressed in the lease or agreement of the parties, which was not done in the case before us. As well might a man who sells a horse to be paid for in the future, claim to recover him back on failure of the purchaser to pay according to his stipulation, as the lessor of real estate to recover it from his

tenant because of his failure to pay rent, there being no stipulation that such failure should work a forfeiture.

But we have the following statutory provision, which is claimed by the appellants to be applicable to the case before us. "If a tenant at will, or from year to year, or for a shorter period, neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, unless such rent shall be paid at the expiration of said ten days." 2 G. & H., p. 359, § 4.

The case before us does not come within any of the clauses of the statute above set out. It is clearly not a tenancy at will, nor for a shorter period than a year; and it seems to be equally clear that it is not a tenancy from year to year. The Legislature, in the second section of the Act above cited, have provided what shall be deemed tenancies from year to year, viz.: "all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord." By the words "*all general tenancies*," we think it clear that the Legislature meant such tenancies only as were not fixed and made certain in point of duration by the agreement of the parties. This is apparent from several considerations. Where lands are demised for a definite term, no notice to quit is necessary in order to terminate the tenancy. See cases in Perk. Dig., p. 350, § 5. Yet the Legislature have provided for terminating tenancies from year to year by three months' notice to quit: Section 3. It would be an absurdity to suppose the Legislature intended to change tenancies for a fixed period, whether for one year, or more, or less, into tenancies from year to year, and then enable the landlord to terminate them by three months' notice to quit. The statute seems to be merely declaratory of the common law on the subject. Says Chancellor KENT, "estates at will, in the strict sense, have become almost extinguished, under the operation of judicial decisions. Lord MANSFIELD observed that an infinite quantity of land was holden in England without lease. They were all, therefore, in a technical sense, estates at will; but such estates are said to exist only notionally, and where no certain term is agreed on, they are construed to be tenan-

cies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estate. The language of the books now is that a tenancy at will arises from grant or contract, and that general tenancies are constructively taken to be tenancies from year to year :" 4 Kent Com., § 10, p. 128.

In the case before us, the tenancy, by the agreement of the parties, was for a year, neither more nor less. Hence it is wholly unnecessary to determine what is meant by the words "or for a shorter period," in the section of the statute above quoted ; but we doubt whether they should be construed to embrace a tenancy for a fixed and definite period. The interpretation that presents itself as the most reasonable is that they embrace a tenancy uncertain as to duration, but one which appears to have been intended by the parties as less than a year. But on this point nothing is decided.

The lease in the case before us created an estate which the law defines to be an estate for years. Such would also have been its character had it been less than a year in duration. " Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years ." 2 Shars. Blackstone, p. 142. " Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great :" 1 Washburn on Real Estate, p. 291.

The defendant being a tenant for years, and not at will, or from year to year, or for a shorter period, it was not competent for the lessor to terminate the tenancy before the expiration of the term, on the ground of failure to pay the stipulated rent.

**PER CURIAM.** The judgment below is affirmed, with costs.

WILLIAMS, R. P. 388, 393 ; 1 Washb. R. P. 476 ; 1 Taylor, L. & T. 54 ; 1 Wood, L. & T. 74. Agricultural lands in Minnesota cannot be leased for more than twenty-one years : Minn. Const., Art. I, § 15.

## b

**Time computed.**

A lease for a term of years "from the first day of July" begins on the second day of July.

**ATKINS v. SLEEPER,**  
Supreme Judicial Court of Massachusetts, 1863.

7 Allen, 487.

Plaintiff made a lease of certain premises to defendant "for a term of three years from the first day of July, 1858," rent payable quarterly, and if the defendant held for a longer time he was to pay rent accordingly. On July 1, 1861, defendant gave written notice that he would vacate the store on or before October 1, 1861, and accordingly on that day the store was vacated and the keys offered to plaintiff, who said that he still regarded defendant as his tenant and should expect another quarter's rent. The premises remained vacant for the full quarter, and on defendant's refusal to pay the rent for the time plaintiff brings this action to recover the same until January 1, 1862. There was judgment for the defendant.

CHAPMAN, J. The original lease from the plaintiff to the defendant was "for the term of three years from the first day of July, 1858." The plaintiff contends that the term commenced on the 1st day of July, and the defendant contends that it commenced on the next day. The inclusion or exclusion of the day of the date of an instrument, in the computation of time, has been a much vexed point; but in a case like the present the authorities are in favor of the defendant. In 4 Cruise Dig. (Greenl. ed.) tit. xxxii, c. 5, § 16, the rule is stated to be, that if a lease be made to hold from the date, or the day of the date, that day is excluded; but if it be to hold from the making, it includes the day. It is stated in still better phraseology in § 17, n. 2. Where time is computed from an act done, the general rule is to include the day. Where it is computed from the day of the act done, the day is excluded. The same rule is stated in 2 Parsons on Con. 179, n. It has been adopted by this Court, and must be regarded as settled in this Commonwealth: Bigelow v. Willson, 1 Pick. 494; Wiggin v. Peters, 1 Met. 127; Farwell v. Rogers, 4 Cush.

460; *Seekonk v. Rehoboth*, 8 *Cush.* 371; *Buttrick v. Holden*, *Ib.* 233.

Exceptions overruled.

As to the method of computing time, see: *Deyo v. Bleakley*, 24 *Barb.* 9; *Bemis v. Leonard*, 118 *Mass.* 502; *Ordway v. Remington*, 12 *R. I.* 319; *Ackland v. Lutley*, 9 *Ad. & E.* 879 (36 *Eng. Com. Law*, 312); *Arnold v. United States*, 9 *Cranch*. 104; *Sheets v. Selden's Lessee*, 2 *Wall.* 177; *Seekonk v. Rehoboth*, 8 *Cush.* 371.

C

Perpetual renewal.

In a lease creating an estate for years, a covenant for the perpetual renewal of such lease is valid if clearly expressed or if such appears to be the intention of the parties thereto.

*BLACKMORE v. BOARDMAN*,  
Supreme Court of Missouri, 1859.

28 Mo. 420.

The directors of the St. Louis public schools demised and leased to Blackmore certain premises for ten years, with a covenant for a perpetual renewal. These premises so leased to Blackmore were sold on execution to one Lewis, who went into possession thereof and while in possession conveyed his interest to Hagre, who in turn sold to Boardman. Prior to the expiration of the original lease Hagre made application to the directors for a renewal thereof, and Blackmore also made application for a renewal to him, to which Hagre filed a remonstrance. The directors renewed the lease to Blackmore. The two questions presented were whether the covenant for perpetual renewal was legal and whether the right of renewal was acquired by Lewis under the sheriff's sale.

RICHARDSON, J. The numerous authorities cited by the defendant's counsel establish in his favor the first two propositions presented in the statement. As the law discourages perpetuities, it does not favor covenants for continued renewals; but, when they are clearly made, their binding obligation is recognized and will be enforced. The covenant for renewal is only an incident to the lease, and as it cannot be passed without the principal, the conveyance of the principal by a proper

description will necessarily carry the incident. They are inseparable, and a right of action cannot exist in favor of a person claiming the benefit of the covenant without any right to the possession of the leasehold; but the covenant, being annexed to the estate, runs with it, and cannot be retained by itself or assigned or severed so as to give an independent cause of action. A sale of the land under execution will pass to the purchaser all the covenants that run with it as effectually as if he had received a conveyance from the lessee; for as the purchaser, after he acquires possession, is bound to pay the rent and in that way assumes the burdens of the lease, he has the right to take advantage of the covenants that touch and concern the thing demised, which enhance the value of the estate.

The parties agree that the application for renewal was in proper form, and, as the minutes of the board of directors show that the notice was before the board on the 11th of August, at the second meeting held after it had been left by Kurlbaum, we think his evidence was properly received. Notice left with a man about the office who had no authority to receive it of course would not bind the Public Schools, but, as the directors are not supposed to be all the time in session, it would seem that the secretary was the proper person with whom such applications should be left. It would be gross neglect in the defendant if he had left the notice with a chance man about the office, and had not returned again to inquire whether it had been received; but the agent was told by the secretary a few days afterward, and in ample time to have given another notice, that it had been received, and under such circumstances it would be a fraud on him to hold that he had lost his rights by his negligence. The parties have requested that the controversy between them shall be determined in this Court in view of all the equities of the case, and, as the admission of the deceased secretary would certainly be competent in a proceeding by the defendant against the board of Public Schools to have specified performance of the covenant for renewal, we have less hesitation in deciding that the

evidence was admissible in this suit. The other Judges concurring, the judgment will be affirmed.

*Effinger v. Lewis*, 32 Pa. St. 367; *Page v. Esty*, 54 Maine, 319; *Boyle v. Peabody*, 46 Md. 623; *Banks v. Haskie*, 45 Md. 207; *Haurie v. Burr*, 24 Barb. 625; *Brown v. Parsons*, 22 Mich. 24; *Holley v. Young*, 66 Maine, 520; *Sweetser v. McKenney*, 65 Maine, 225.

## d

**Land let "On Shares."**

**A contract to cultivate a farm on shares does not create an estate for years, but by it the parties are owners in common of the crop.**

**CASWELL v. DISTRICH,**  
**Supreme Court of New York, 1836.**

15 Wend. 379.

In this case a party agreed to till a certain farm, and for his work and care to take a certain specified quantity of the different kinds of crops raised thereon during the year.

NELSON, J. The agreement between the parties was a letting of the premises upon shares, and, technically speaking, was not a lease: 8 Johns. R. 151; 3 Ib. 221; 2 Ib. 421, n.; 8 Cowen, 220. There is nothing which indicates that the stipulation for a portion of the crops was by way of rent, but the contrary. The shares were of the specific crops raised upon the farm. It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the *landlord* has an interest to the extent of his share in the crops. If it is deemed *rent*, the whole interest belongs to the tenant until a division. Where a farm is let for a year *upon shares*, the landlord looks to his interest in the crop as his security, and thereby is enabled to accommodate tenants, who otherwise would not be trusted for the rent.

This case is clearly distinguishable from that of *Stewart v. Doughty*, 9 Johns. R. 108. There the Court, from the cor-

respondence between the phraseology of the instrument and the terms usual in leases in the reservation of rent, came to the conclusion that the proportion of the crops specified in the agreement was intended as payment of *rent in kind*, and that therefore the whole interest belonged to the tenant. If my conclusion be correct, then the parties were *tenants in common in the crops*, and as the plaintiff stood in the place of her testator, she was not entitled to sustain her action, and the Common Pleas did right to grant a non-suit.

Judgment affirmed.

*Walls v. Preston*, 25 Cal. 59; *Guest v. Opdyke*, 31 N. J. L. 552; *Creel v. Kirkham*, 47 Ill. 344; *Hurd v. Darling*, 14 Vt. 214.

e

**Lease of building.**

**A lease of a building, *eo nomine*, is a lease of the land on which the building stands.**

**LANPHER v. GLENN,**  
Supreme Court of Minnesota, 1887.

37 Minn. 4.

**GILFILLAN, C. J.** At the common law the rule undoubtedly was that a lessee of real estate for a term, who had covenanted to pay the rent without excepting the case of destruction by fire or tempest of the buildings on the real estate, was not released from his obligation to pay the rent by such destruction. This was because the lease created an interest in the land, by virtue of which the lessee might, notwithstanding the destruction of the buildings, retain possession of the land to the end of his term. An exception to this, or, rather, a case to which, from the circumstances, the rule did not apply, was that of renting rooms or apartments in a building, in which case no interest in the real estate beyond that connected with and necessary to the enjoyment of the particular room or apartment

passed, and of necessity such interest ceased when the room or apartment ceased to exist; for in such a case, especially where there are several tenants, some above and some below, they cannot all have the realty "*usque ad caelum.*" Such cases were, from the nature of the case, construed not to pass any interest in the land, independent of the particular room or apartment rented.

The lease in this case having been executed prior to the Act of 1883 (Laws 1883, c. 100), comes under the rule of the common law. Whether liability to pay rent continued, notwithstanding the building was destroyed by fire, must depend on whether the lease passed an interest in the land—that is, whether it was a lease of the land for the specified term. The description of the premises leased is this: "The real property situate in the county of Ramsey and State of Minnesota, and described as follows, that is to say: The two-story (and rear basement) frame stores and dwellings overhead, situated on the westerly side of Jackson Street, near what is designated on D. L. Curtice's 1880 map of the city of St. Paul as Winter Street, situated in the said city of St. Paul, being a portion of the east half of the northwest quarter of section thirty-one," "together with the appurtenances thereof."

It does not appear from the lease (nor otherwise) that any part of the building was excepted. The words "and rear basement" do not indicate it. They are to be taken as used to describe the building as a two-story and rear-basement building. It appears, therefore, that the entire building is covered by the description. Land may be granted or leased by the description of a building on it. "And by the grant of a house, the ground whereon it doth stand doth pass." *Shep. Touch.* 90. A garden may pass by conveyance of a house: *Smith v. Martin*, 2 *Saund.* 400. The demise of a mill carries the ground on which it stands: *Bacon v. Bowdoin*, 22 *Pick.* 401. See, also, *Ainsworth v. Ball*, 8 *Allen*, 293; *Hooper v. Farnsworth*, 128 *Mass.* 487; *Winchester v. Hees*, 35 *N. H.* 43; *Wilson v. Hunter*, 14 *Wis.* 683 (80 *Am. Dec.* 795); *Rogers v. Snow*, 118 *Mass.* 118. This lease was, then, a lease of the ground as well as the build-

ing, and it brings the case within the rule of the common law we have stated.

Judgment affirmed.

Minn. Gen Laws, 1883, ch. 100. Under the statute the lease is terminable at the option of the lessee: Boston Block Co. v. Buffington, 39 Minn. 385.

f

Assignment.

The tenant may assign his estate for years, and the purchaser, upon entering the premises, becomes tenant of the original lessor.

SANDERS v. PARTRIDGE,  
Supreme Judicial Court of Massachusetts, 1871.

108 Mass. 556.

Sanders executed a lease to Jackson & Muzzy of premises in Boston for the term of ten years, for the annual rent of \$5,800, payable quarterly. Jackson & Muzzy afterward assigned "all their right, title, and interest in and to the within lease," to defendant Partridge, by a writing upon the original duly signed by them, but not under seal.

WELLS, J. To maintain an action for rent requires privity of contract or privity of estate. Either will suffice, if rent is due.

When a lease is assigned, and the assignee enters under it, he becomes tenant of the lessor; he is bound by all the covenants of the lease which are not personal to the lessee, and he is liable to the lessor for all rents which accrue while he holds the estate. If there is no express covenant for the payment of rent, contained in the lease, then the covenant implied from the reservation of rent binds the lessee, and "runs with the land" so as to bind the assignee also: Patten v. Deshon, 1 Gray, 325; Blake v. Sanderson, 1 Gray, 332; Croade v. Ingraham, 13 Pick. 33; Waldo v. Hall, 14 Mass. 486; Smith Landl. & Ten. 287; 1 Washb. Real Prop. 326; 4 Blytherwood's Conveyancing, 388.

In the present case, the defendant entered into the enjoyment and control of the leased premises, under what purported to be an assignment of the lease. If that transaction operated in any manner to transfer to the defendant the entire leasehold estate, then he was in as assignee and may be held by the lessor for the rent which fell due while he so held the estate.

The defendant insists that the lease, being under seal, could be assigned only by an instrument under seal. This rule, applied to an assignment of the instrument itself, as a contract, is well settled at law: *Wood v. Partridge*, 11 Mass. 488; *Brewer v. Dyer*, 7 Cush. 337; *Bridgham v. Tileston*, 5 Allen, 371. If, therefore, a leasehold estate can be transferred only by an assignment of the instrument by which it was created, this objection must be held to be decisive.

But we do not so understand the law. A lease, by whatever form of instrument it is made, conveys to the lessee an estate or interest in the land. He may in turn convey to another any subordinate interest, or his entire estate, in any appropriate form, without regard to the form in which he acquired his own title. The leasehold estate may be transferred by devise; by sale on execution as a chattel: Gen. Sts. c. 133, § 49; or sale by an administrator as personal assets. In all these cases the purchaser becomes bound to the lessor to pay the rent and perform the covenants that run with the land, because the law imposes that obligation upon him by reason of his succession to the estate of the lessee. The same result follows from any transfer by the lessee of his entire estate. A seal is not essential to such transfer, even of a lease for more than seven years. No written instrument is necessary, except to satisfy the statute of frauds: Gen. Sts. c. 89, § 2. Even if the provisions of § 3 are applicable to the assignment of a lease, as well as to the creation of an estate by lease, a seal is only required to give it effect against parties other than the assignor, his heirs and devisees, and persons having actual notice thereof. The defendant cannot set it aside for the want of a seal.

The real question, then, is whether this instrument is suf-

ficient to satisfy the statute of frauds, as an assignment of an estate or interest in land.

It is indorsed upon and refers to the original lease; and the lease was delivered with it to the assignee. The description of the premises, the terms upon which they are to be held, and the intent to convey the estate are thus all made to appear by the writing. "All our right, title, and interest in and to the within lease" includes whatever leasehold estate the assignor might hold by virtue of that lease. If a seal had been attached, there would be no question of its operation to convey the estate of the assignor in the land described in the instrument referred to: *Patten v. Deshon*, 1 Gray, 325; *Blake v. Sanderson*, Ib. 332.

So far as it affects the sufficiency of the writing, under the statute of frauds, we do not see that it makes any difference that the instrument referred to is under seal, while the transfer is not. The reference is not merely to the instrument itself as the subject-matter of the assignment, but also to its contents as defining the subject-matter upon which the assignment is intended to operate.

We are of opinion that the writing relied on as an assignment in this case was sufficient to satisfy the statute of frauds, and that between the parties a seal was not rendered necessary to its operation as an assignment, either by reason of the length of the term or from the fact that the assignor acquired his title by a lease under seal: *Taylor Landl. & Ten.*, § 427, and cases cited in notes.

It was not necessary that the defendant should execute any writing, or make any express agreement. His obligation is implied by law from his acceptance of the assignment and his entering upon the enjoyment of the estate.

The report states such an acceptance and entry by the defendant. His employment of the former agent of his assignor to collect the rents for him was a sufficient entry. He is liable, then, for the rent which fell due July 1, 1870, for the preceding quarter, unless he had before that time ceased to hold the relation of tenant or assignee of the lease. The liability of

an assignee, upon covenants running with the land, extends only to such as are required to be performed while he holds that relation : *Patten v. Deshon*, 1 Gray, 325.

It is stated in the report that "on or about May 18, 1870, the defendant executed an assignment of said lease," by a writing not under seal, to one Newhall. If Newhall entered under that assignment, and the defendant ceased to collect the rents, control the premises or have any interest therein, before the end of the quarter, he would not be liable for any rent which should afterward fall due. But the case does not find that Newhall ever entered or collected the rents under his assignment, nor that the defendant at any time ceased to collect and receive the rents through his agent, and any inference to that effect would be inconsistent with the distinct statement of the report that upon the entry of the defendant under his assignment from the lessees "the rents were thereafter collected by said agent and paid over to the defendant."

Upon the report, we must assume that the defendant's evidence went no farther than to show a formal instrument of assignment without change of possession. That would not be sufficient to relieve the defendant from his liability as assignee of the lessees.

It is stated generally in the text-books, that an actual entry upon the demised premises, by an assignee of the lease, is not requisite in order to charge him with the performance of covenants running with the land. But we think this proposition will hold good only in respect of assignments by deed recorded and delivered, which are usually regarded as effecting a transfer, not only of title, but also of the legal possession. An assignment without deed, as of a chattel interest only, requires some act of entry or change of actual possession, to complete its operation and divest the assignor of responsibility which arises from the holding of the estate : *Taylor Landl. & Ten.*, §§ 449-451.

It was not necessary for the plaintiff to assent to the assignment, or recognize the assignee as his tenant, otherwise than by his suit for the rent.

It does not appear that the plaintiff had already received his rent from Jackson and Muzzy ; or that the defendant had any equitable defense as against them. The fact that Jackson and Muzzy remained liable for the rent upon their express covenants in the lease, notwithstanding their assignment, is sufficient explanation of the statement that the suit was brought with the plaintiff's consent, and at the request of Jackson and Muzzy.

The report shows that the defendant became responsible to the plaintiff as assignee of the lessees, and does not disclose any facts sufficient to defeat his action for the rent which thereafter became due upon the lease. According to the terms of the report, therefore, the plaintiff is to recover judgment for the full quarter's rent, \$1,450, and interest.

Judgment for the plaintiff accordingly.

g

**Sublease**

Where the whole term is transferred the transaction amounts to an assignment, but where any part of the interest is retained the transaction is simply a sublease and the sublessee is not tenant of the original lessor.

DARTMOUTH COLLEGE *v.* CLOUGH,  
Supreme Court of Judicature, New Hampshire, 1835.  
8 N. H. 22.

RICHARDSON, C. J. We have attentively considered this case, and are of opinion that there must be judgment on the verdict.

The case stated in the declaration is that the plaintiffs, in the year 1808, made a lease to the Cliffords of certain land in Warren for nine hundred and ninety-nine years, reserving a certain yearly rent, and that in the year 1825 all the interest of the Cliffords in the premises came to the defendant by assignment ; and the plaintiffs claim to recover of the defendant,

as such assignee, all the rent reserved in the lease which became due between January 1, 1831, and January 1, 1834.

It was supposed by the counsel of the plaintiffs, at the trial, that the plea of *nil debet* was an admission of the lease from the plaintiffs to the Cliffords; and no evidence on that point was produced. But no case has been cited, nor have we found any case that gives the slightest countenance to the supposition that the plea was in law an admission of that lease. On the contrary, it is well settled that *nil debet* puts in issue the whole declaration. Even in cases where it is not a proper plea, if it be pleaded, and the plaintiff, instead of demurring, takes issue upon it, he will have to prove every allegation in his declaration: 1 Chitty's Pl. 478; 2 Starkie's Ev. 140, note (u) and 463. The plaintiffs then failed in this respect in a point essential to be proved in order to entitle them to a verdict.

But there are other defects in the case of these plaintiffs. In order to maintain debt or covenant for rent there must be either privity of contract or privity of estate between the plaintiff and defendant: Walker's Case, 3 Coke, 23.

Between the lessor and the lessee there is both privity of contract and privity of estate so long as the lessee retains the term. And the original lessee is liable to an action of covenant for the rent, although he may have assigned all his interest to some third person with the assent of the lessor. For even in that case the privity of contract continues between the lessor and the lessee: 1 Chitty's Pl. 36.

But if the lessee assigns the term, with the assent of the lessor, after this, debt does not lie against the lessee: 1 Chitty's Pl. 106; 1 Saunders, 241, note 5; Auriol *v.* Mills, 4 D. & E. 98.

When the lessee has assigned to a third person his whole term, both debt and covenant lie against the assignee on the privity of estate: 2 East, 580; Howland *v.* Coffin, 12 Pick, 125; 9 Pick. 52.

And he who takes an assignment of the whole term, even by way of mortgage, is liable for the rent, although he may never

have entered and taken possession : *McMurphy v. Minot*, 4 N. H. R. 251 ; 5 Com. Law R. 72 ; *Turner v. Richardson*, 7 East, 335.

An assignee of the whole term is only liable for the rent while he continues in possession under the assignment. If he assigns over to another all his interest, he is not liable for the rent, although he may continue in possession : *Butler's N. P.* 159 ; *Tovey v. Pitcher, Carthew*, 177 ; *Taylor v. Shum*, 1 B. & P. 21 ; *Walker v. Reeves, Douglas*, 461, note ; *Chancellor v. Poole*, Ib. 735 ; *Woodfall's Landlord and Tenant*, 280, 281.

There is a material difference between an assignee of a term and an under-tenant.

He only is to be considered as an assignee of the term who takes the whole estate of the lessee in the land, or in some part of the land : 17 Johnson, 70 ; 3 Wilson, 234 ; *Woodfall*, 276–280 ; 11 East, 52 ; *Com. Dig. Debt, E. & F.*; *Cro. James*, 411 ; *Cro. Eliz.* 633 ; 2 *Levintz*, 231.

When the lessee conveys to a third person the whole or a part of the land for a portion only of his term, such third person is not an assignee of the term, but an under-tenant : *Woodfall*, 276 and 287, 288.

There is no privity of contract or of estate between the original lessor and an under-tenant ; and the under-tenant is not liable to the original lessor in any form of action for rent : 1 *Chitty's Pl.* 36 ; *Douglas*, 183 ; *Woodfall*, 288.

In this case it was proved on the part of the plaintiffs that the defendant had been in possession of a part of the land, and that he had paid a part of the rent reserved on the lease from the plaintiffs to the *Cliffords*, for two years. This was *prima facie* evidence that he was an assignee as to part of the land. But it was only *prima facie* evidence. And there was nothing in the case that could preclude him from showing that he was only an under-tenant. His possession under his lease was notice to all the world of the nature of his interest. It was enough to make it the duty of the plaintiffs to inquire into the nature of his title before they brought their action.

As it was clearly shown that the defendant was a mere under-tenant, it is very certain that this action cannot be maintained.

Judgment on the verdict.

*Craig v. Summers*, 47 Minn. 189.

But the sublessee may protect his possession by payment of the rent to the original lessor who has the right of entry for non-payment under the original lease.

*PECK v. INGERSOLL*,

Court of Appeals, New York, 1852.

7 N. Y. 528.

**GARDINER, J.** The original lease between Mrs. Dunscombe and the plaintiffs contained a covenant of re-entry on the non-payment of rent by the lessees for ten days after it fell due. The jury have found that the ground-rent due to Mrs. Dunscombe by the defendants, the lessees' tenants; and the only question of any importance is whether they were justified in making such payment and entitled to have the amount applied in discharge of their rent due the plaintiffs.

It has been frequently decided upon the most obvious principles of justice that if an under-tenant is compelled to pay rent to the head landlord he may deduct it from the rent due to his immediate lessor; or if the sum paid exceeds that due the lessee the tenant may in an action of assumpsit for money paid to the use of the lessor, recover the excess: 1 Smith's Leading Cases, 4 Am. ed. 202, 3 and 4, marg. pp. 73, 4, 5, and cases there cited; 4 Term, 511. This privilege upon the part of the under-tenant exists if there be in the head landlord a legal right by the exercise of which the person who pays may be damned unless he satisfies it: 1 Leading Cases, 203. It is not necessary that the head landlord should distrain or even demand the money or commence or threaten a suit. The right to enforce his claim in this way will make the

payment by the under-tenant compulsory within the principle of the decisions.

In this case the original lessor had, as we have seen, the right of re-entry. The under-tenant was authorized to protect his possession against the exercise of this right by paying the rent to the head landlord. Such a payment is not voluntary, and there is no question but that it was made by the defendants in good faith with an honest purpose to shield themselves from damage. I think the judgment of the Common Pleas should be affirmed.

Judgment affirmed.

Underletting is not a violation of the covenant not to assign: *Den v. Post*, 25 N. J. L. 285; *Jackson v. Harrison*, 17 Johns. 66; *Copland v. Parker*, 4 Mich. 630; *Leduuke v. Barnett*, 47 Mich. 158. And an assignment is not a violation of the covenant not to sublet: *Taylor, L. & T.* 403; *Lynde v. Hough*, 27 Barb. 415. *Contra*: *Den v. Post*, 25 N. J. L. 285. But see: *Field v. Mills*, 33 N. J. L. 254.

## 2

### LEASE.

A lease is a contract for the possession and profits of land for a determinate period, usually with a recompense of rent.

SAWYER *v. HANSON*,  
Supreme Judicial Court of Maine, 1845.  
24 Me. 542.

TENNEY, J. This complaint is to obtain possession of one-half of a dwelling-house standing upon land not claimed as the property of either party, erected thereon by the owner's consent. It is alleged that the defendant, on the first day of June, 1844, having before that time had lawful and peaceable entry into the lands and tenements of the complainant, etc., "and whose estate in the premises was determined on the 29th day of May, 1844, then did and still does unlawfully refuse to quit the same; although the complainant avers that he gave notice in writing to said Hanson thirty days before the day of making this complaint to quit the premises."

The complainant relied upon a mortgage of the property described in the complaint from the defendant to one Smith, dated June 17, 1843, to secure a note of the same date payable in six months; Smith, on March 29, 1844, made a written assignment of said mortgage and note to one Forsaith, who, on May 28, 1844, assigned the same to the complainant. On June 1, 1844, the defendant was served with a notice in writing, signed by the complainant, to quit the premises immediately. A non-suit was directed by the District Court, to which exceptions were taken.

The statute referred to, under which this process is sought to be maintained, is applicable to three cases only: 1st. Where any unlawful and forcible entry has been made into any lands or tenements. 2d. Where there has been any unlawful and forcible detainer thereof. 3d. "Whenever a tenant, whose estate in the premises is determined, shall unlawfully refuse to quit the same, after thirty days' notice in writing, given by the lessor for that purpose." Rev. St. c. 128, § 2 and 5. The evidence presents no such forcible entry or detainer as to sustain the complaint: Commonwealth *v.* Dudley, 10 Mass. R. 403; Saunders *v.* Robinson, 5 Metc. 343. And we are not satisfied that the complaint can be maintained upon the evidence by virtue of the other provision. To bring the case within the fifth section, the relation of landlord and tenant must be shown to have existed, and the lease to have terminated; and a holding over by the lessee. The language clearly imports that the process, under this part of the statute, shall be in favor of a lessor or his assignee against a lessee or one holding under him. The determination of the estate referred to may be of a lease for years, or where a tenancy at will existed; it was not intended for those cases, where the title could be contested; but where the relation was such that the defendant was precluded from denying to the complainant the right of possession by his own contract.

A lease is defined to be a *contract* for the possession and profits of lands and tenements on the one side, and a recompence of rent or other income on the other. Any words, which

show the intention of the parties, that one shall divest himself of the possession, and the other shall come into it, whether they run in the form of license, covenant, or agreement, are of themselves sufficient: 4 Cruise's Dig. 67.

There is no allegation in the complaint, and no evidence shown by the exceptions, of any contract or agreement between the parties. The house having been the property of the defendant was mortgaged by him for security of his debt; according to the facts in the case, this mortgage had been foreclosed, and he divested of all estate in the premises; after which the interest of the mortgagee passed to the complainant by the assignment. The latter was the absolute owner of the house, it being personal property, and the defendant was in the occupation of the same; the complainant's title accrued two days before the notice to quit, given to the defendant; no relation of landlord and tenant can be implied or inferred from the facts reported.

Exceptions overruled.

*Thompson v. Sanborn*, 52 Mich. 141; *Harlan v. Emery*, 46 Iowa, 538; *Ackerman v. Lyman*, 20 Wis. 454; *Collyer v. Collyer*, 21 N. E. Rep. 114.

a

**Covenants.**

The covenants in a lease may be either expressed or implied, and those of a certain kind run with the land.

**Express.**

There are express covenants, as, one for a renewal of the lease.

**RENOUD v. DASKAM,**  
**Supreme Court of Errors, Connecticut, 1868.**

34 Conn. 512.

In this case there was an express covenant for a renewal of the lease, and not making his request therefor until the first one had expired, and the landlord then declining to renew, the lessee files his bill in equity to enforce its execution.

PARK, J. This case depends upon the construction that shall be given to that part of the lease executed between these parties, which is as follows: "The said William Daskam also further covenanting and agreeing, that after the expiration of said term of five years, he will, if thereto desired by the said John W. Renoud, make and execute to the said Renoud a lease of the said premises for the further term of five years, upon the terms and conditions in this lease contained."

The petitioner claims that this provision of the lease gave him a reasonable time after the expiration of the five years in which to express his desire for another term; while the respondents insist that it required that the optional right should be exercised, on or before the termination of the five years. The lease is silent as to the time when the right may be exercised, and the petitioner infers that it exists after the five years expire, from the fact that the lessor covenants that he will execute another lease after that time, if thereto desired. But desired when? The lease does not answer the question. This covenant, construed literally, has reference solely to the act of the lessor, and not to the time when the desire for another term may be communicated to him. The constructions given to it by both parties harmonize with the language used, and we must therefore consider other parts of the lease and the surrounding circumstances in order to ascertain the meaning intended by the parties.

It can hardly be supposed that the lessor intended to grant an optional right to take the premises for another term, that might be exercised after the five years should expire, for the lessee might decide at the last moment to vacate the premises, and the lessor would then be left not only without a tenant, but at an unseasonable time to obtain one. He would thus run the hazard of losing the rent of his premises for a year, and that too when the right to this extent could be of no practical benefit to the lessee; for it is hardly to be supposed that, with the right, he would delay till the close of his term before he fully determined whether he would stay longer or not.

Again, if this right existed after the expiration of the five years, it existed during a reasonable time after that event; for when a right is given, and no time is prescribed for its exercise, a reasonable time is allowed. It follows then that the lease extended not only during the period of five years, but during the reasonable time within which the right might be exercised, should the lessee delay his election till the last moment; for it can hardly be claimed that the parties intended that the premises should be vacated during such time, when the lessee might elect for another term. Now the lease is for a period of five years, with an annual rent at a fixed sum payable quarterly. This provision of the lease is at war with the construction that the petitioner gives to the covenant in question. Its proper meaning is that the respondent will give another lease of the premises for another term of five years, to commence from and after the expiration of the first term, if thereto desired. The phrase "after the expiration of said term of five years," must have reference to the commencement of the second term, and not to the time when the lease should be given; for if it has reference to the giving of the lease, how long after shall it be given? and in that case when will the second term commence? No time is specified for either, and both would be left in doubt and uncertainty. The petitioner neglected to express his desire for another term on or before the expiration of the five years, and we think cannot now require that another lease should be given.

There is nothing in the petitioner's claim of waiver. This is not a case of forfeiture for the non-payment of rent, but a case where the petitioner has neglected to perform the condition on which his right to another term depended.

We advise the Superior Court to dismiss the petition.

**Implied.**

**There are implied covenants, as, that for quiet enjoyment.**

**DUNCKLEE v. WEBBER,**  
**Supreme Judicial Court of Massachusetts, 1890.**  
**151 Mass. 408.**

In this case an action was brought for breach of an implied covenant for quiet enjoyment in a written lease. The defendant had given a mortgage prior to the lease, and the assignee of the mortgage made entry for foreclosure and sold the premises.

C. ALLEN, J. The Court having ordered a verdict for the defendant, we have only to consider whether in any aspect of the case a verdict for the plaintiff would have been warranted.

1. There was sufficient evidence that Lincoln & Son had authority to let the premises for three years. One of the firm testified that the defendant "told us to let the house for \$800 a year, and the time was three years." Shortly after the letting (the time is not stated exactly, but the jury might have found it to be in the following month), the witness informed the defendant of the renting of the estate to the plaintiff, and of the collection of one month's rent. Afterward a settlement was had in which Lincoln & Son were allowed a commission on the stipulated rent for three years. Authority by parol was sufficient: *Shaw v. Nudd*, 8 Pick. 9; *Heard v. Pilley*, L. R. 4 Ch. 548.

2. The papers executed amounted to a present lease of the premises. No further or more formal lease was contemplated: *Shaw v. Farnsworth*, 108 Mass. 357; *McGrath v. Boston*, 103 Mass. 369.

3. The mode of signing the paper A was sufficient to bind the defendant. The contrary is not contended in the argument: *Goodenough v. Thayer*, 132 Mass. 152; *Amory v. Kanoffsky*, 117 Mass. 351; *Gowen v. Klous*, 101 Mass. 449, 454.

4. There was an implied covenant for quiet enjoyment during the term. The papers A and B constituted a lease for three years. The rent was to be paid during that time. The

papers contain nothing to control the ordinary implication that the lessee shall have quiet enjoyment: *Ellis v. Welch*, 6 Mass. 246, 250; *Dexter v. Manley*, 4 Cush. 14, 24; *Foster v. Peyser*, 9 Cush. 242, 246; *O'Connor v. Daily*, 109 Mass. 235; *Mack v. Patchin*, 42 N. Y. 167; *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145, 152; *Bandy v. Cartwright*, 8 Exch. 913; *Hall v. London Brewery Co.*, 2 B. & S. 737.

5. There was evidence of a breach of this covenant. The defendant had given a prior mortgage, the assignee of which made an entry for foreclosure, and sold the premises under a power of sale contained in the mortgage, and the purchaser gave notice to the plaintiff to vacate the premises, with a threat of legal process to eject him. The plaintiff could not defend against this title and might properly yield to it without a suit: *King v. Bird*, 148 Mass. 572; *Carpenter v. Parker*, 3 C. B. N. S. 206.

6. The doctrine that an implied covenant of a life-tenant ceases with his life does not apply: *Adams v. Gibney*, 6 Bing. 656.

7. There was evidence of special damage. The plaintiff had to remove from the premises and to seek another place of residence. And he testified that the fair rental value of the premises was more than he was paying, and that property in that vicinity had recently risen in value.

New trial granted.

#### **Covenants that run with the land.**

**Some covenants run with the land; as, covenants in a lease to pay rent and taxes upon the demised premises.**

**TRASK v. GRAHAM,**  
**Supreme Court of Minnesota, 1891.**

**47 Minn. 571.**

**VANDERBURGH**, J. The record shows that the parties jointly entered into a lease with the St. Anthony Falls Water-Power Company, of the date of May 5, 1885, whereby they rented

from the company, by lease under seal, for the term of five years, from July 1, 1885, the premises in controversy. By the terms thereof the lessees, Trask & Graham, who were partners, agreed to pay as rent for the premises the sum of \$300 per annum, in quarterly installments; and also agreed to assume and pay all real-estate taxes levied on the leased premises during the term of the lease, beginning with the taxes for 1885. The lessees jointly, as partners, owned a saw-mill, situated upon the leased premises. On the 2d day of February, 1889, the defendant, Graham, in consideration of a contract for the sale of his interest and title in and to the leased premises and the saw-mill situated thereon, entered into between him and the plaintiff, Trask, did, by an instrument in writing under seal, at his request, duly sell and convey all his right, title, and interest in and to the same to one Whitmore, who represented the plaintiff, for the sum of \$5,500 consideration paid by the latter, and therein agreed to warrant and defend the title thereto against all lawful claims. For the purposes of this action it is understood that the sale and transfer is to be treated as an independent transaction, and wholly disconnected from other partnership business between the parties, or any accounting therefor; and plaintiff, it is admitted, stands in the shoes of Fairchild, as assignee, and succeeded to the sole possession of the premises under the lease as of the date of the transfer. The rent for the current quarter became due April 1 next after the date of the assignment; and the taxes for the year 1888 became payable on the 1st Monday of January, 1889, but not delinquent until June 1, but became and were a separate and fixed liability of both lessees then in possession as to each other. The plaintiff subsequently paid the rent for the whole quarter, and also the taxes for 1889, and by this action he seeks to recover from the defendant the amount of one-half the taxes for 1888, so paid by him, and also one-half of the rent that had accrued between January 1 and February 2, the date of the transfer and assignment to him, though not due till April 1 following.

As respects the relations of the assignee of a lease, the rule

is: "When a covenant relates to or is to operate upon a thing in being, parcel of the demise, the thing to be done by force of the covenant is, as it were, annexed to the thing demised, and goes with the land, binding the assignee to the performance, though not named; and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land." Tayl. Landl. and Ten., § 437; Spencer's Case, 5 Rep. 16; *Blake v. Sanderson*, 1 Gray, 332. The foundation of this liability of the assignee is the privity of estate that exists between him and the lessor. The covenant to pay the rent and taxes runs with the land, and the plaintiff, Trask, under the assignment, assumed the liability for the rent and taxes that accrued and became due during his possession as assignee: *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Post v. Kearney*, 2 N. Y. 394. The assignee, being liable solely in privity of estate, is liable only for obligations maturing or breaches occurring while he holds the estate as assignee, and not for those which occurred before he became assignee or after he ceased to be such: *Patten v. Deshon*, 1 Gray, 325.

It follows from the application of these principles to this case that the assignee, Trask, was himself liable for the rent for the whole quarter within which he became assignee, the rent not having yet accrued, and which he must be held to have assumed. And the quarter's rent in such cases is not to be apportioned: *Graves v. Porter*, 11 Barb. 592. We are unable to see why the same rule does not apply as to the taxes. The covenant to pay was general, and would be satisfied if paid within the year, and so as to save the lessor harmless. The lessees would not be in default, at least till the taxes became delinquent, which would not be till June 1st. There had been no breach of the covenant to pay the taxes, and the assignee took the leasehold estate *cum onere* as to them also. The plaintiff, as assignee, was liable directly to the lessor upon the covenant to pay the taxes. There had been no previous breach of the covenant, and the plaintiff, as assignee, took the place of the lessee in respect to liability upon covenants not yet matured: *Mason v. Smith*, 131 Mass. 510. It must be presumed that the

contract was made in contemplation of the legal relations of the parties, and that the consideration was adjusted accordingly. If the plaintiff, as between them, was not to stand in the place of the defendant, and the defendant was to remain liable for the unpaid rent and taxes not yet due, it should have been so expressed in the contract.

Granting, then, that the lien of the taxes attached to the land January 1, the obligation to pay them under the lease had not yet matured, and there is no covenant against incumbrances or liens on the land. Defendant merely transfers his right, title, and interest in the mill and lease, and this is all the covenant of warranty applies to. He does not warrant the title to the land: *Sweet v. Brown*, 12 Met. 175. No breach of the covenant of warranty is shown or relied on: Rawle, Cov. (4th Ed.) 178, note.

Order reversed.

b

**Tenant estopped to deny Landlord's Title.**

**The tenant is estopped to deny his landlord's title, and the term may be forfeited by the lessee's disaffirmance of his landlord's rights therein.**

**NEWMAN v. RUTTER,**  
**Supreme Court of Pennsylvania, 1839.**

8 Watts, 51.

Walter Newman conveyed certain lands to Moore in fee, reserving eight shillings rent on each lot, payable annually, and if the rent was not paid when due the grantor might distrain for rent, and the grantee also agreed to erect certain buildings thereon. Peter Newman, the plaintiff, by assignments became entitled to those rents. Plaintiff brings action of ejectment against defendant to recover the lots on the ground that the rents were not paid nor the buildings erected according to the said deed of conveyance.

ROGERS, J. One of the objections to the judgment of the Court of Common Pleas, is their answer to the fourth point. The Court instructed the jury, in answer to that point, that to

entitle the plaintiff to enter agreeably to the terms of the deed, it must appear not only that the rent was in arrear and unpaid, but that there was not sufficient personal property on the lot, liable to be distrained, to enable plaintiff effectually to compel payment of the rent by distress. By the terms of the deed it is stipulated that if the rent should be in arrear sixty days, the grantor might distrain; and if a sufficient distress should not be on the premises, that the owner of the rent might enter on the lots and repossess them, as though the deed had not been made. The deed must be construed according to the intention of the parties; and, to entitle the plaintiff to enter, it must appear not only that the rent was in arrear for the time specified, but that upon a distress being made by him, it was found that there was not sufficient property on the premises to pay it. In this point of view, therefore, the defendant, rather than the plaintiff, has reason to complain of the charge, as the Court put the case upon the fact, whether there was enough of property on the premises to answer the plaintiff's claim. If the plaintiff had pursued his remedy by distress, there were, if the witnesses are to be believed, at all times goods more than sufficient for that purpose.

But the plaintiff contends that the defendant denied his title, and that this denial amounts to a forfeiture, and that, therefore, he can maintain ejectment. A forfeiture may be incurred either by a breach of those conditions which are always implied and understood to be annexed to the estate; or those which may be agreed upon between the parties, and expressed in the lease. The lessor, having the *jus disposendi*, may annex whatever conditions he pleases, provided they be not illegal, unreasonable, or repugnant to the grant itself; and upon breach of these conditions may avoid the lease. Any act of the lessee, by which he disaffirms or impugns the title of his lessor, comes within the first class; for, to every lease the law tacitly annexes a condition that if the lessee do anything which may affect the interest of the lessor, the lease shall be void, and the lessor may re-enter. Every such act necessarily determines the relation of landlord and tenant;

since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy the interest out of which the lease arises; would be the most palpable inconsistency: Bar. on Leases, 119; Woodfal's Landlord and Tenant, 219. So where the tenant does an act which amounts to a disavowal of the title of the lessor, no notice to quit is necessary; as where the tenant has attorned to some other person or answered an application for rent by saying that his connection as tenant with the party applying has ceased: Bul. N. P. 96; Esp. N. P. 463. In such cases, as the tenant sets his landlord at defiance, the landlord may consider him either as his tenant, or as a trespasser. But these principles only apply where there is no dispute as to the person entitled to the rent; so where there was a refusal to pay rent to a devisee in a will which was contested, it is not such a disavowal of the title as will enable the devisee to treat the tenant as a trespasser, and to maintain ejectment without previous notice: Woodfal's Landlord and Tenant, 219, and the authorities there cited. These principles are usually applied to the relations which subsist between landlord and tenant on a demise for a term of years; and whether they are applicable to a grant of land in fee with the reservation of a rent charged on the land may admit of doubt, although no case has been cited, and I know of none, where it has been so applied. But however this may be, the doctrine does not hold where there is no denial of the title under which the defendant claims, but it is denied that the plaintiff is the person entitled to receive the rent, although he is the representative or devisee of the original grantor, or where, as in this case, the proportion of the rent which he owns is disputed. The plaintiff claims the entire rent, and the Court and jury have decided that he is entitled to a moiety only. It would, therefore, be a harsh application of the principle to decide that a defense which certainly has some plausibility about it, should work a forfeiture of the estate. Courts of law always lean against a forfeiture, and it is the province of a Court of Equity to relieve against it. Whenever a landlord

means to take advantage of a breach of covenant, so as that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture, as distraining for the rent, or bringing an action for the payment of it, after the forfeiture has accrued, or accepting rent: Bul. N. P. 96; Woodfal, 227; Bar. on Leases, 226. For this reason the Court were right in admitting in evidence a receipt from the plaintiff to the defendant for ground-rent for the two lots for the year 1831. This evidence was pertinent, because the receipt of rent waives the forfeiture, if any such there was, for neglecting to erect the buildings on the lot, as provided for in the deed.

In deducing title to the ground-rents, plaintiff proved that the ground-rent in Newmanstown had been devised by the last will and testament of Walter Newman, to Henry Newman and David Newman, as joint devisees. This, of course, vested in Henry Newman, the plaintiff, a moiety only of the ground-rent reserved in the deeds. For the purpose of proving that he was entitled to the whole ground-rent charged on the *locus in quo*, he offered in evidence a deed from Magdalena Newman, administratrix of David Newman, deceased, one of the devisees of Walter Newman, to Christian Seibert, dated the 24th of August, 1786, for sixty-three acres of the tract of one hundred and twenty-eight acres, devised to Henry and David Newman, by Walter Newman, the said sixty-three acres including the one-half of Newmanstown; also a deed from Christian Seibert to Francis Seibert, for same, dated the 19th of April, 1793; also the will of Francis Seibert, devising the same sixty-three acres, including one-half of Newmanstown, to Elizabeth, wife of Peter Shoch, dated February 9, 1811, with parol proof that the said Francis Seibert, in the year 1805, or thereabouts, until the time of his death, and those claiming under him since his death, held and exercised exclusive ownership and occupation of the said sixty-three acres, including the one-half of Newmanstown, and that Henry Newman, the other devisee of Walter Newman, and those claiming under him, in the same time,

viz., from the year 1805, or thereabouts, to the present time, have exercised exclusive ownership on the remainder of the tract of one hundred and twenty-eight acres, including the other half of Newmanstown, and that the two lots for which this ejectment is brought, are located in that part of the said tract last mentioned ; with further parol proof that search has been made in the recorder's office in Dauphin and Lebanon Counties, for deed or agreement of partition of the premises, and none such has been found.

From the evidence here offered, it is plain that the ground-rent was not divided between the devisees by writ of partition ; so that the only question is, was such proof offered as will justify the jury in presuming a deed, grant, or mutual conveyance ? The evidence would have proved that the plaintiff had been in the enjoyment and receipt of the entire rent, charged on the premises, for a period of thirty years and upwards, and that they who deduce their title from David Newman, had received the whole ground-rent charged on this portion of the estate. A jury is required, or at least may be advised by a Court, to infer a grant of an incorporeal hereditament, after an adverse enjoyment for the space of twenty-one years ; and in *Hearn v. Lessee of Witman*, 6 Bin. 416, it is held, that what circumstance will justify the presumption of a deed is matter of law ; and that it is the duty of the Court to give an opinion whether the facts proved will justify the presumption. This presumption seems to have been adopted in analogy to the act of limitations, which makes an adverse enjoyment of twenty-one years, a bar to an action of ejectment ; for as an adverse possession of that duration will give a possessory title to the land itself, it seems, also, to be reasonable that it should afford a presumption of right to a minor interest arising out of the land. The ground of presumption, in such cases, is the difficulty of accounting for the possession or enjoyment, without presuming a grant or other lawful conveyance. This is not an absolute presumption, but one that may be rebutted by accounting for the possession consistently with the title existing in another. Here we cannot account for the enjoyment and

receipt of the entire rent, without presuming a grant or some lawful conveyance from the one tenant in common to the other ; and for this reason we think the Court erred in excluding the evidence.

The Court were right in admitting the evidence of Job Pearson. The objection goes to his credit rather than to his competency.

Judgment reversed, and *venire de nova* awarded.

*Allen v. Chatfield*, 8 Minn. 435. A tenant is not estopped, as against a stranger, to deny his landlord's title: *Cole v. Maxfield*, 13 Minn. 235; *St. Anthony Falls Water Power Co. v. Morrison*, 12 Minn. 249. The tenant cannot claim that the title was in himself prior to the lease: *Morrison v. Bassett*, 26 Minn. 235; *Sharpe v. Kelley*, 5 Denio, 431; *Vernam v. Smith*, 15 N. Y. 327.

C

Rent.

Rent is in effect the price to be paid for an estate for years or other leasehold interest, and must be certain or capable of being reduced to certainty, and must be paid though the buildings on the land leased be destroyed.

FOWLER *v.* BOTT,  
Supreme Judicial Court of Massachusetts, 1809.  
6 Mass. 67.

An action of covenant for \$225, having accrued after the destruction by fire of the buildings leased.

SEWALL, J. [After stating the plaintiffs' demand, the several issues, and the verdict.] By a motion in arrest of judgment, this question, arising upon the defendants' third plea, is to be decided by the Court, viz.: Whether after a destruction by fire of the buildings demised, the lessors, without rebuilding, can recover their rent.

The supposed hardship of the case has been urged upon the attention of the Court as an argument for the defendants. The answer to this argument is, that a lease for years is a sale of the demised premises for the term ; and unless in the case of an

express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents or any other deterioration. The rent is in effect the price, or purchase-money, to be paid for the ownership of the premises during the term; and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser.

Independently, however, of the general reasoning, which has been gone into upon this question, the law applicable to the case at bar has been long settled. In the case of *Balfour v. Weston*, cited for the plaintiffs, the same question was made which arises in this case; but the Court of King's Bench refused to hear an argument upon it, being of opinion that the point had clearly been determined by the authorities; and on that occasion Justice BULLER refers to the opinion of Lord MANSFIELD in the case of *Pindar v. Ainsley & Rutter*, where the question occurred in an action of ejectment brought by the tenant in a lease for years against the landlord for the possession of some houses, which, having been burnt down, had been rebuilt by the landlord during the term; but after acts by the tenant, from which his abandonment of the lease was to be presumed. Lord MANSFIELD stated, as an established principle of law, that the consequence of the house being burned down is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole of the term.

Nor is it correct to say that in cases of this nature the Courts of Equity in England afford relief. The cases cited in the argument for the defendants, as in point to that purpose, are noticed by Justice BULLER in the case of *Doe v. Sandham*, and he speaks of them as decisions on particular circumstances, and not upon any general principle or rule of equity.

Upon the whole, this established rule of law determines the construction and operation of the contract relied on by the plaintiffs in the case at bar. When words of the same import are used, as were employed in the contracts, upon which the decisions cited and referred to were made, the intentions of

the parties must be understood in conformity to those decisions, even admitting the supposed hardship of the case or severity of the demand. But even this objection seems inapplicable when we consider the lease as a bargain and sale for the term at an agreed price. When there is no covenant on the part of the lessor to insure against fire, or any engagement to repair the premises in that event, or any other casualty, by which they may be impaired or destroyed, the accident becomes the misfortune of the lessee, and he is not excused from his rent.

Judgment is not arrested, but must be entered according to the verdict.

Minn. Gen. Laws, 1833, ch. 100; *supra*, 37 Minn. 4. The rent of a quarry at a certain number of cents per perch for each and every perch quarried is a certain money rent: *Cross v. Tome*, 14 Md. 247.

#### Exception.

If apartments in the upper story of a building, being the subject of a lease, are destroyed by casualty, the lessee is discharged from his covenant to pay rent.

GRAVES *v.* BERDAN,  
Court of Appeals, New York, 1863.  
26 N. Y. 498.

Rooms in the second story of a building were leased to the defendant for five years. The building was destroyed by fire. There was no covenant by the landlord or tenant to rebuild. The action is for rent for a quarter subsequent to the fire.

ROSEKRANS, J. The opinion delivered by Justice EMOTT in this case, in the Supreme Court, is a correct exposition of the law applicable to it, and for the reasons stated therein, the judgment should be affirmed. The case of *Stockwell v. Hunter*, 11 Metc. 448, may be added to the authorities cited by Justice EMOTT to show that a lease of basement rooms or chambers, in a building of several stories in height, without any stipulation, by the lessor or lessee, for rebuilding, in case of fire or

other casualties, gives the lessee no interest in the land upon which the building stands, and that if the whole building is destroyed by fire, the lessee's interest in the demised rooms is terminated, and the lessor may, after the destruction of the building, enter upon the soil and rebuild upon the ruins of the former edifice.

It may be added that at common law, where the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned. In Rolle's Abridgment, 236, it is said that if the sea break in and overflow a part of the demised premises, the rent shall be apportioned for though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term : Com. Land. and Ten. 218 ; Gilb. on Rents, 182.

Where the lessee takes an interest in the soil upon which a building stands, if the building is destroyed by fire, he may use the land upon which it stood, beneficially, to some extent, without the building, or he may rebuild the edifice ; but where he takes no interest in the soil, as in the case of a demise of a basement, or of upper rooms in the building, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachments of the sea, mentioned

in Rolle's Abridgment; and the established rule for the abatement or apportionment of the rent, should be applied in the former as well as in the latter case. The same reason exists for its application in both cases.

But even if the lessee's interest in the demised apartment, in a case like this, was not terminated by the total destruction of the building, it may be doubted whether the lessee could recover rent so long as he failed to give to the demised upper rooms the support necessary to them for special enjoyment. The rule seems to be settled in England, that where a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story: *Humphrey v. Brogden*, 12 Q. B. 739; s. c., 1 Eng. Law and Eq. 241; *Rowbothem v. Wilson*, 36 Ib. 236; *Harris v. Roberts*, 6 El. & Br. 643; s. c., 7 Ib. 625. In the case last cited the duty of such support is recognized as a general common-law right. In a lease of upper rooms by the owner of the entire building, a covenant should be implied on the part of the lessor to give such support to the upper rooms as is necessary for their beneficial enjoyment. It has been decided in this Court that the statute forbidding the implication of covenants in conveyances of real estate, does not apply to leases for years: *Mayor of New York v. Maybee*, 3 Kern. 151; *Vernam v. Smith*, 15 N. Y. 332, 333.

The judgment should be affirmed.

*Contra*: *Helburn v. Mofford*, 7 Bush (Ky.), 169. The reservation of rent is not essential to the creation of an estate for years. A lease may be for money paid: *Osborne v. Humphrey*, 7 Conn. 340.

## d

**Termination—By Lapse of Time.**

**The term expires by efflux of time on the last day thereof without notice to quit.**

**BEDFORD v. McELHERRON,**  
**Supreme Court of Pennsylvania, 1815.**

**2 S. & R. 49.**

Plaintiff leased land to defendant for a term of four years, reserving the annual rent of a turkey on the 23d day of December in each and every year if required. The plaintiff suffered the defendant to remain in possession seventeen years after the expiration of the lease, and the only question is whether the plaintiff must give defendant notice to quit before he can maintain an action of ejectment.

TILGHMAN, C. J. Where a lease is made for a year, and so from year to year as long as both parties please, there must be notice to quit in due time before the end of the year; otherwise the law implies a new lease for a year. So where a lease is made to one to hold, during the pleasure of the lessor, there must be due notice to quit; because it would be unreasonable that a man that has gone to the expense of cultivating land and making preparations for a crop, while his estate was uncertain, should be turned off at a moment's warning. But where the lease is to expire at a certain time the law is different, because each party knows what he has to trust to. There can be no occasion to give notice to quit where the lessee has agreed to quit at a certain time. In the present case the lessor might have maintained an ejectment at the end of the lease. But there is no evidence that the lessor required the possession at the end of the lease. On the contrary, he permitted the lessee to retain possession for seventeen years afterward. From this, I think, it may be fairly presumed that the defendant retained the possession with the consent of the plaintiff; and if so, he was tenant at will at least, or perhaps it may be more reasonably inferred that he remained tenant from year to year at the same rent, which was reserved by the written lease for four years.

But whether he was tenant at will or from year to year is immaterial, because in both cases notice to quit was necessary. The charge of the president of the Court of Common Pleas was correct, therefore, and the judgment should be affirmed.

Judgment affirmed.

2 Taylor, L. & T. 465; Moshier *v.* Reding, 12 Maine, 478; Pierson *v.* Turner, 2 Ind. 123; Young *v.* Smith, 28 Mo. 65; Clapp *v.* Paine, 18 Maine, 264; Ellis *v.* Paige, 1 Pick. 43; Cobb *v.* Stokes, 8 East, 358.

**By Agreement.**

This estate may be terminated also by mutual agreement of the parties.

NELSON *v.* THOMPSON,  
Supreme Court of Minnesota, 1877.

23 Minn. 508.

CORNELL, J. The point of alleged variance between the complaint and the evidence is one that, had it been made in the District Court, might, and in the rightful exercise of its discretion ought, upon motion, to have been obviated. It comes too late, therefore, to be considered on this appeal: Babcock *v.* Sanborn, 3 Minn. 141; Washburn *v.* Winslow, 16 Minn. 33.

Under the testimony two separate and distinct issues were raised, the determination of either of which in defendants' favor would, as it is claimed, have entitled them to a verdict upon the whole case. Upon the submission of the case to the jury the Court, in its charge, confined them to the consideration of one of these issues alone, and the evidence applicable thereto, thereby wholly withdrawing the other from their consideration. Under this ruling a verdict was rendered in favor of the defendants, which, on motion of plaintiff, was set aside because of an erroneous instruction in reference to the issue thus submitted to and passed upon by the jury. Conceding the correctness of the decision upon the motion on this point,

it is contended that the verdict ought not to have been set aside, because, upon the whole evidence, the defendants were entitled to a verdict upon the other issue. As to this issue, viewed in the most favorable light possible for defendants, its determination depended upon a disputed fact, concerning which there was conflicting evidence, sufficient at least to raise a reasonable doubt as to what might legally have been the finding of the jury thereon. It cannot, therefore, be assumed by this Court that the verdict upon this issue would have been for the defendants, in case it had been properly submitted to the jury, and the decision of the District Court in awarding a new trial cannot be overruled upon this ground.

The remaining question relates to the alleged surrender of defendants' lease and their estate thereunder. Upon the testimony, the fact is undisputed that defendant Thompson, having removed from the premises on February 10, went to plaintiff's agent, Farrington, for the purpose of paying the rent to that time and surrendering up the premises to plaintiff. In reference to what then took place she testifies: "I told Mr. Farrington that I came to give him the key and pay the rent. He said he would take the key, but he should hold me for the rent; and we had considerable conversation that day. I told him I did not see how he could, as I went out in good faith. He told me he would hold me for the rent of those premises. I had the key at the time. Nothing else occurred, only I paid him the money. I figured it up and said it was \$33.30, and he said it was \$33.33. He may have said more than once that he would hold me for the rent. I think he said it twice."

In reference to the same transaction, Farrington testifies: "She came and tendered me the money up to that time; I received it. She also tendered me the key; I declined to take it, except conditionally. I said to Mrs. Thompson: 'I can't take the key unless you agree—you and your associates—to make good the rent of the unoccupied premises until I have an opportunity of renting them.' I said I would expect to hold them for the rent while the house was unoccupied. She replied to that that she had not means to pay it, and that the

other parties would have to pay it. I took the key on those conditions."

Upon this testimony—and there is nothing in the case in the least conflicting with it—the District Court was right in assuming, as a fact uncontroverted upon the evidence, that the landlord had no intention of accepting a surrender and terminating the tenancy at that time. He received the key only conditionally, and with the express declaration that he should still continue to hold the lessees for the rent upon the covenant in their lease. There can be no pretense, then, of any surrender by virtue of an agreement, and this necessarily implies an intentional and express assent on the part of the lessor to the termination of the lease. Neither can any surrender by operation of law be predicated upon these facts. That, as said by PARKE, B., in *Lyon v. Reed*, 13 M. & W. 285, 306, can only take place "where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist." Such would be the case of a lessor taking unqualified possession of demised premises, and dealing with them in a way wholly inconsistent with the continuance of an already existing and unexpired term. In such a case, as against the lessor, the law, upon the principle of estoppel, implies a mutual agreement between him and his lessee, whereby the possession of the premises has been abandoned by the latter, and resumed by the former, in pursuance of such agreement.

The act of the plaintiff in the case at bar in receiving the key, subject to the condition stated as to the continued payment of rent, was not of this character. It distinctly recognizes the continued existence of the term, and is in no way inconsistent with it. If it be conceded that the renting to Lewis, on April 1, was of that character, there was no surrender by operation of law, on account of that act, until that time, and plaintiff would be entitled to his rent, under the lease until that time.

Order affirmed.

**Or by Operation of Law.**

**SMITH v. PENDERGAST,**  
**Supreme Court of Minnesota, 1879.**  
26 Minn. 318.

**BERRY, J.** Moore, owning and being in possession of certain premises, demised the same, by lease under seal, for the term of one year from September 7, 1871, to the firm of Howard & Carpenter, composed of John R. Howard and Ira M. Carpenter. Thereupon the firm went into possession, and performed all the covenants and conditions to be performed on their part. Pursuant to one of its provisions, the lease was renewed for an additional term of four years, and under the renewal the lessees continued in possession, and fully performed on their part, except as hereinafter stated. On November 1, 1873, Moore, the lessor, conveyed the demised premises to the plaintiff, and transferred to him all his rights in and under the lease.

At the time of the execution of the lease there was a two-story building upon the demised premises, the second story of which was used as a tin-shop, access to which was had by an outside flight of stairs, upon the demised premises, and on the south side of the building. This flight of stairs furnished the only public means of access to the tin-shop. In addition to the site of the building mentioned the lease demised another portion of the lot upon which the building was situated, which portion was well adapted as a place of deposit for bulky goods, such as agricultural machinery. In the latter part of September, 1875, the plaintiff entered upon this portion of the lot, and during October following removed the stairs, and there erected a building which he has ever since occupied as a bank. At the same time, plaintiff put up a flight of stairs at the rear of the building, so as to afford access to the second story and to the tin-shop, and subsequently, at the request of one of the defendants, cut a doorway in the rear part of the first story of the building, and put in a door, so as to afford

the lessees more convenient access to the stairs which he had erected.

Previous to plaintiff's entry upon the above-mentioned portion of lot 7, he informed Howard (of the firm of Howard & Carpenter) of his desire to make such entry and to make the erection and improvements aforesaid, promising Howard that if he would consent to the same he would obtain for him another lot upon which to store and deposit goods or agricultural machinery, in case he desired him to do so. Howard made no objection then or at any other time to plaintiff's acts or proceedings in the matter, but permitted him to go on with his entry and improvements, and by his (Howard's) conduct led the plaintiff to believe that it was entirely satisfactory to him.

On November 8, 1875, Howard & Carpenter assigned all their rights under the lease to John R. Howard, who retained possession of the demised premises, except as above stated, until January 27, 1876. On that day, and after the plaintiff had made the entry and all the erections and improvements aforesaid, Howard assigned all his rights under the lease to the defendants. They thereupon entered into possession of the demised premises, except the portion entered upon by plaintiff, as aforesaid, and occupied and used the same, under the lease, from said 27th day of January up to September 7, 1876, inclusive, when they surrendered possession to the plaintiff. Defendants paid the rents reserved in the lease which accrued up to March 7, 1876. The last payment was made by them on March 9, 1876, and they have paid no rent for their use and occupation of the premises since March 7, 1876. No dissatisfaction was ever expressed to plaintiff on account of his entry and improvements until April, 1876, and then by the defendants only, and no damages were claimed before that time on account thereof.

Upon the state of facts summarized above the Court below found as conclusions of law: First, that the acts and conduct of the lessees were equivalent to consent to the plaintiff's entry and improvements aforesaid; second, that the plaintiff was

entitled to judgment against the defendants for rent, according to the terms of the lease, at the rate of \$50 per month, for the six months between March 7 and September 7, 1876, with interest.

We have no doubt of the correctness of these conclusions. The first, however, does not go as far as the findings of fact would have justified the Court in going, nor as far as it ought to go. We are of opinion that the facts found by the Court make out a case of a surrender to the plaintiff, by operation of law, of that part of the demised premises entered upon and occupied by him as aforesaid. The case appears to us fully to fall within the doctrine laid down by Baron PARKE in Lyon *v.* Reed, 13 Mees. & Wels. 285, a case cited and applied by this Court in Nelson *v.* Thompson, 23 Minn. 508. In considering what is meant by a surrender by operation of law, Baron PARKE says: "This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former." After giving some other instances he adds: "It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted—namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist."

Now it is found, in effect, that the plaintiff's entry upon, and occupation and improvement of, the before-mentioned portion of the demised premises, was with the knowledge and assent of the then lessees, Howard & Carpenter. The plaintiff could not lawfully have made the entry and im-

provements, or have gone into and continued the occupation, if, as respected the portion so entered upon and occupied, the leasehold estate continued to exist. The validity of the plaintiff's entry and occupation the lessees were, therefore, estopped to dispute. The plaintiff acted and made expenditures upon the basis of the assent of the lessees, and to permit them to repudiate their assent would prejudice the plaintiff, and work a fraud upon him. See *Pence v. Arbuckle*, 22 Minn. 417.

As respects the then lessees, Howard & Carpenter, we think the facts found clearly show a surrender of that portion of the demised premises entered upon by the plaintiff. Howard was one of the firm of Howard & Carpenter, and, through the firm's assignment to him, he succeeded to the firm's rights only. By Howard's assignment to the defendants, made after the plaintiff's entry and improvements, and after his occupation, the defendants acquired no more rights than Howard had; and the surrender was as effectual and operative as against them as against Howard or Howard & Carpenter. This disposes of the defendants' position that the plaintiff cannot recover the rent reserved in the lease because he has evicted the defendants from a portion of the demised premises. There has been a surrender of a portion of the demised premises by operation of law, and this satisfies the requirements of the statute found in Gen. St. 1878, c. 41, § 10.

It is further claimed by the defendants that the plaintiff is not entitled to recover the entire rent reserved, because they are deprived of the enjoyment of a portion of the demised premises. If it were found that, on account of this deprivation, taking all the accompanying facts and the circumstances into consideration, the value of the use of the demised premises was impaired, it is possible that this point might present some difficulty. But it is not so found, and there is, therefore, no ground upon which the rent can be reduced.

It is urged that the Court below erred in not distinctly and specifically finding upon the question, whether and how much

the rental value of the demised premises was diminished by the deprivation spoken of. The answer to this is that, if the finding was defective in these respects, the Court below should have been moved to perfect it. Otherwise, any such objection to it is taken as waived. These are all the points which appear to us to require special consideration, and the result is that the judgment is affirmed.

*Cahill v. Eastman*, 18 Minn. 324; *Dayton v. Craik*, 26 Minn. 133; *Lucy v. Wilkins*, 33 Minn. 441; *Chadbourn v. Rahilly*, 34 Minn. 346.

## B

### ESTATES FROM YEAR TO YEAR.

**When one occupies land by permission of the owner, without any definite time therefor being fixed, but the reservation of rent or other circumstances indicate an agreement for an annual holding, an estate from year to year is thereby created.**

a

#### Rent Reserved.

*HUNTER v. FROST*,

Supreme Court of Minnesota, 1891.

47 Minn. 1.

**MITCHELL, J.** The plaintiff leased to defendant a tenement for the term of thirteen months from April 1, 1888, for an agreed rent of \$540 per annum, payable in equal installments of \$45, in advance, on the first day of each month. The defendant entered and occupied the premises during the term, and after its expiration held over and continued in possession, and paid rent to the plaintiff, in accordance with the terms of the lease, up to and including the month of November, 1889. Several days prior to October 30, 1889, the defendant served

upon plaintiff written notice that he would vacate the premises on November 30 next ensuing. In pursuance of this notice he vacated them, and has not since that time occupied them or paid rent. This action is to recover rent from December 1, 1889, to May 1, 1890.

It is not questioned but that at common law the defendant, by holding over after the end of the term without any new agreement, and paying rent according to the terms of the prior tenancy, which was accepted by the plaintiff, became a tenant from year to year, and that this tenancy could not be terminated by either party, except upon due notice (at common law, six months), terminating at the end of the first or any subsequent year (May 1). But defendant's contention is that tenancies from year to year have been abolished by the statutes of this State, and converted into tenancies at will, which may be terminated at any time by either party, by giving the length of notice provided by Gen. St. 1878, c. 75, § 40, which, in this case, would be one month, the rent reserved being payable monthly. While tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were anciently tenancies strictly at will, terminable at any time by either party without notice, yet such tenancies had become so well established and so fully recognized in the common law that it would naturally be supposed that, if it had been intended to convert them into mere tenancies at will, it would have been done by express and clear language, and not left to mere inference or implication. We think we are safe in saying that, although our statutes bearing upon the subject have always been the same as now, it has never been the understanding of the bar of the State that they had introduced any such radical change in the law as that now contended for. Evidently this Court, in considering the cases of *Gardner v. County of Dakota*, 21 Minn. 33, 38, and *Dayton v. Craik*, 26 Minn. 133 (1 N. W. Rep. 813), assumed that tenancies from year to year still existed in this State. It was squarely so decided in *Smith v. Bell*, 44 Minn. 524 (47 N. W. Rep. 263), although the question was not

very fully argued in that case, and we would not feel bound to follow it if fully convinced that it was wrong.

Counsel for defendant does not claim that there is any express provision of statute abolishing such tenancies, but he relies on certain provisions which he claims effect that result by implication. The first is Gen. St. 1878, c. 45, § 1, dividing estates in land into estates of inheritance, estates for life, estates for years, estates at will and by sufferance; the argument being that, as estates from year to year are not named, therefore they are impliedly abolished. The next is Gen. St. 1878, c. 75, § 40, which provides that all estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party, and, when the rent reserved is payable at periods of less than three months, the term of such notice shall be sufficient if it is equal to the interval between the times of payment. It is argued that by this the Legislature intended to provide for the termination of all estates which did not terminate themselves without notice, and made provision for all the estates which it recognized, which did not terminate themselves, to wit, estates at will. Reference is also made to Gen. St. 1878, c. 84, § 11, governing summary proceedings for the recovery of possession by a landlord. It is said that this was evidently intended to give a landlord a summary remedy whenever the relation of landlord exists; but, as the statute only refers to two classes of cases in which the remedy may be employed when the tenant is not in arrears of rent, to wit: when the tenant holds over after the termination of the time for which the premises were demised, and where a tenant at will holds over after the determination of any such estate by notice to quit; therefore, if tenancies from year to year still exist, the tenant in such cases could only be evicted by an action of ejectment.

It seems to us that counsel has been led into error by failing to duly consider the state of the common law when the statutes were passed, and by assuming that, when they speak of tenancies at will, they refer exclusively to tenancies strictly at

will—that is, those which, but for the statute in reference to notices to quit, would have been terminable at any time by either party without notice. It was determined very anciently by the common law, upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his will in a wanton manner, and contrary to equity and good faith, but that they could only be terminated by notice for a longer or shorter period, depending usually upon the nature of the original demise. At first there was no other rule but that the notice should be a reasonable one. Because of the uncertainty of this rule, the Courts early adopted, as far as possible, some fixed period as being reasonable. In those tenancies which, from the nature of the original demise, they construed to be tenancies from year to year, the Courts adopted six months as a reasonable notice, holding that such tenancies could only be determined by a notice of at least six months, *terminating at the expiration of the first or any succeeding year*. And in those cases which did not come within the class of tenancies from year to year, because by implication for some definite period less than a year, the rule was generally adopted that the time of notice should be governed by the length of time specified as the interval between the times of payment of rent, and should be equal to one of these intervals, *and must end at the expiration thereof*. The result was that at common law estates at will, in the strict sense, became almost extinguished at a very early date, under the operation of judicial decisions. Indeed, it would have been difficult to conceive of an instance of such a tenancy, except where created by the express contract of the parties to that effect. But they still remained substantially tenancies at will, except that such will could not be determined by either party without due notice to quit. The enumeration or classification of estates adopted by our statutes is but declaratory of that found in all writers on the common law, even after the doctrine of tenancies from year to year had been fully established by the decisions of the Courts. Estates in land, less than freehold, have always been

classified as of three sorts: (1) Estates for years; (2) estates at will; (3) estates by sufferance: 2 Bl. Comm. 139. This classification was first incorporated in statutory form in the old Revised Statutes of New York, and from them borrowed successively by Michigan and Wisconsin, and perhaps other States; but in none of them was it ever held, or even suggested, that the statute affected or in any way changed the common law as to tenancies from year to year. Did the statutory enumeration necessarily exclude tenancies from year to year, there would be much force in defendant's argument. But, so far from this being the case, they may be included in either estates for years or estates at will, or both, as they possess many of the qualities of each. A tenancy from year to year, though indeterminate as to duration until notice given, has most of the qualities and incidents of a term for years, and, when notice has been given, the term is as much fixed for a definite period as any term for years. A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. Such an estate is not determined by the death of either lessor or lessee; it is assignable and demisable, and may be pleaded as a term. But, although it has many of the qualities of a term for years, yet it is, as already remarked, substantially a tenancy at will, except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year: 1 Woodf. Landl. and Ten. 219. For purposes of notice to quit, it is a general tenancy at will: Tayl. Landl. and Ten., § 467, and cases cited. And for purposes of general classification it is treated as a species of tenancy at will, and as properly so as are those tenancies which by implication are held to be for some period less than a year, as from quarter to quarter, or from month to month, where notice to quit is also necessary in order to terminate them; the only difference being as to the length of the notice and the time it should terminate.

Notwithstanding what was decided in *Smith v. Bell, supra*,

we have come to the conclusion, upon fuller examination, that the provisions of chapter 75, § 40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purposes of such notices a tenancy from year to year is a tenancy at will. In some of the cases cited by plaintiff, it was held, as in *Smith v. Bell*, that similar statutes apply only to the notice required to terminate a tenancy at will, and have no application to a tenancy from year to year. In one of these cases it is said that the purpose of the statute was to give tenants at will the right to the notice therein specified before they could be dispossessed, whereas, before such enactment, they were not entitled to any notice whatever; in other words, that the statute was to give the tenant the right to notice in cases which, but for the statute, would have been tenancies strictly at will. It seems to us that, in placing this construction upon such statutes, the Courts have entirely overlooked the fact that tenancies strictly at will had already practically ceased to exist, except where the parties had expressly contracted that the tenancy might be terminated at any time without notice; and as in such cases the contract of the parties, and not the statute, would control, the result would be that such a construction would render the statute meaningless. We have, therefore, reached the conclusion that the description of estate commonly known as a tenancy from year to year is comprehended in the term "estates at will," as used in chapter 75, § 40. But this section has reference only to the *length* of notice, and does not assume to otherwise change or affect the nature of the tenancy, or the existing rules of law as to when the notice should terminate. For example, where, by implication, the tenancy is from quarter to quarter or from month to month, the rent being payable quarterly or monthly, the notice must still terminate with the quarter or month; and, where the tenancy is from year to year, the notice must terminate with a year, although the length of it may now be shorter than six months, as formerly required at common law. Consequently, while the notice given by defendant in this case was sufficient as to length,

yet it was wholly ineffectual, because not terminating at the end of a year.

There is nothing in the point that there can be no such thing as a tenancy from year to year in this State because of the statute of frauds: Gen. St. 1878, c. 41, § 10. The Courts have uniformly held that tenancies from year to year were not affected by such a statute. The cases from Massachusetts and Maine are not in point, because expressly placed upon their statutes providing that an estate or interest in land, created without an instrument in writing, "shall have the force and effect of *an estate at will only*."

Judgment affirmed.

WILLIAMS, R. P. 389; Taylor, L. & T. 55; 4 Kent Comm. 114; Schuyler *v.* Smith, 51 N. Y. 309; Sullivan *v.* Cary, 17 Cal. 80; Jackson *v.* Salmon, 4 Wend. 327; Prickett *v.* Ritter, 16 Ill. 96; Botsford *v.* Darling, 47 N. Y. 668; Hanchet *v.* Whitney, 1 Vt. 312; Hunt *v.* Morton, 18 Ill. 75; Lounsbury *v.* Snyder, 31 N. Y. 514; Johnson *v.* Albertson, 51 Minn. 333; Brant *v.* Vincent, 59 N. W. Rep. 169; Rogers *v.* Brown, 58 N. W. Rep. 981; Huntington *v.* Parkhurst, 87 Mich. 38 (49 N. W. Rep. 597); Unglisch *v.* Marvin, 128 N. Y. 380 (28 N. E. Rep. 634).

b

No Specific Rent Reserved.

HUNT *v.* MORTON,  
Supreme Court of Illinois, 1856.

18 Ill. 75.

CATON, J. The whole of the merits of this case resolve themselves into the inquiry, whether this was a tenancy at will, or from year to year. The father of the defendant was admitted into the possession of the premises in the fall of 1850, by an agent of the plaintiff, without any specific contract for the payment of rent, with the agreement that he might remain till spring. He continued in the possession of the premises with his family, of which the defendant was a member, during the year 1851, and that season cultivated and

raised a crop on the land. Sometime during the winter of 1851-52, the father of the defendant left the premises in the possession of the defendant, who cultivated and raised a crop upon them in 1852. At what particular time the defendant succeeded to the possession of his father is not very satisfactorily shown by the testimony, but there is no doubt that he did obtain the possession through his father; and so far as the rights of the plaintiff are concerned, it was but the continuance of the original possession taken by his father in the fall of 1850, and the case should be considered the same as if the father had continued and was still in possession. There never was, strictly speaking, a tenancy at will. By agreement the first tenancy was to continue till the spring of 1851, with some encouragement from the plaintiff's agent, that the tenancy might continue for the year; or, at least, so long as would enable the tenant to raise a crop on the land, which would have taken the balance of the year. Without any new agreement, and without objection from the landlord or his agent, the tenant continued his possession for two years and over, and cultivated the land in crops for both seasons. This certainly created a tenancy from year to year, if it is possible for such a tenancy to be created without an express agreement to that effect, which I presume will not be controverted.

I shall not stop to refer to the authorities, showing that a tenant from year to year is entitled to six months' notice prior to the expiration of the year, in order to terminate the tenancy. They are sufficiently referred to in the case of *Prickett v. Ritter*, 16 Ill. R. 96; although that was of a monthly and not of a yearly tenancy. We hold such to be the law in this State, as it has been held in England and most of the States of the Union. Here no notice to quit, as required by law to terminate the tenancy was given; consequently, that tenancy still continued, when this action was commenced. Such being the case, we cannot hold that the plaintiff was injured by the decision of the Court withdrawing the evidence from the jury. The nature of the tenancy was a question of law to be decided by the Court. It being a tenancy from year to year, which

still continued for want of a notice to terminate it, of which there was no pretense, all other testimony became immaterial, for it was impossible, in the present state of the case, for the plaintiff to recover.

The judgment must be affirmed.

Judgment affirmed.

C

**Termination.**

**Either party may terminate this lease by due notice.**

STEFFENS *v.* EARL,

Supreme Court of New Jersey, 1878.

40 N. J. L. 128.

E. leased certain premises to S. by the month, to commence on the first day of May, at the monthly rent of \$10. On the 29th day of June following, E. gave written notice to S. to vacate the premises on the first day of the next August. S. refused to vacate the premises, and E. brings this action to eject him and to recover judgment.

REED, J. The first objection urged against the judgment in this case is relative to the statement in the affidavit of the existence of the tenure. The statement in the affidavit is that "deponent leased said premises to said Steffens by the month, to commence on the 1st of May last, at the monthly rent of \$10." It is said that this is merely the statement of a conclusion of law, and not a statement of such facts as will disclose to the Court the existence of a tenancy, as a legal conclusion. In support of this position, the case of *Fowler v. Roe*, 1 Dutcher, 549, is adduced. In that case the statement in the affidavit was that the defendant was "her tenant," and held over premises "heretofore leased to him;" and it was held insufficient, because it was the claimant's conclusions from facts not disclosed. I do not perceive in what manner this affidavit is invalidated by the rule in that case, which was merely an assertion of the general rule that in pleadings and

complaints analogous thereto, upon which judicial action is to be grounded, statements of legal conclusions, without the facts upon which they are predicated, are vicious. How does it appear that this affidavit states a mere legal conclusion, and that there are undisclosed facts? If A. says to B., "I will let you have that house by the month, for \$10 a month," and B. acquiesces and goes into possession, I think a statement that A. leased to B. by the month, at \$10 a month, would sufficiently state the facts of the letting. The legal effects of a letting, by these words, is then determinable by the Court. To require more than this would be laying down a rule more stringent than that in the case of *Brahn v. Jersey City Forge Co.*, 9 Vroom, 74. I think the affidavit is, in this respect, sufficient. It is also urged that the statement in the affidavit that "the said term has expired, and the said Steffens holds over," is also a conclusion of law merely, and so insufficient. But it is not the statement of legal conclusions which invalidates the affidavit, but the absence of a statement of the facts upon which such a conclusion can be grounded. The tenancy in this case is alleged to be terminated by notice. The renting and the notice as to terms and time are set out fully. If they support this conclusion, its statement as a conclusion does no harm, and if the facts fail to support it, its statement affords no assistance to the claimant.

What, then, in the first place, is the character of his tenancy, in respect to time?

To support the judgment in this case, it must be a monthly letting. The defendant insists that the words employed by the claimant, in the affidavit, import a tenancy at will, or from year to year, and therefore a three-months' notice was requisite to determine the tenure. The question is important from the fact that, acting upon the supposition that the tenancy was monthly, only a month's notice was attempted by the claimant. Indeed the distinction between tenancies from year to year and tenancies for a less period, in all the cases, seems to be important only in relation to the notice by which the determination of either kind can be effected. Unless it can be

shown that monthly or weekly tenancies are unknown, I do not see how it is possible to hold the tenancy described in the affidavit to be other than a monthly tenancy. That such tenancies have an existence, the cases hereafter cited will establish, and to hold that the contract here shown is a monthly letting is only giving to the words of the affidavit their literal force. Further argument would be wasted upon this point.

If a monthly tenancy, is there a sufficient notice shown?

The rule relative to notices seems to be as follows: Where there is a lease for a certain period the term determines without notice: *Cobb v. Stokes*, 8 East, 358; *Right v. Darty*, 1 Term R. 159; *Decker v. Adams*, 7 Halst. 99. In uncertain tenancies reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII, according to Lord ELIZBOROUGH, been six months: *Doe, d. Strickland, v. Spence*, 6 East, 120.

This rule was applied to all uncertain tenancies in this State, whether rent was or was not reserved: *Den v. Drake*, 2 Green, 523. The time was changed to three months by Act of 1840 (Pamph. L., p. 104), now, with a little change in the text, the twenty-seventh section of the landlord and tenant Act in the revision: Rev., p. 575.

In cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is that the notice must be regulated by the letting, and must be equivalent to a period: *Taylor on Land. and Ten.*, § 478; *Archb. on Land. and Ten.* § 87. How the rule arose is uncertain. It can not have its origin in any resolutions of the Council. Baron PARKE, in *Huffell v. Armistead*, 7 C. & P. 17, he knew of no decision holding a week's or monthly notice was necessary to determine a weekly or monthly tenancy; also, the remarks of the Judges, to the same intent, in *Wright v. Campbell*, 3 C. B. 921.

It seems, however, to have very early shaped itself into a custom. The habit of giving and requiring reasonable notice, in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from

year to year, was, according to Lord ELLENBOROUGH, very early held to be six months, was, probably by a custom equally as old, in tenancies for less periods, established as now stated by the books.

By strict relativity, the rule of a half year's notice in tenancies from year to year, would only require a half month's or a half week's notice in cases of monthly or weekly tenancies. The brevity of the latter, and the length of the former kind of tenancies was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognitions of what was obviously a custom, and, as such, the cases would seem to have as much weight as authority as if they had expressly ruled the point.

The first is the case of *Doe, ex dem. Parry, v. Hazell*, 1 Esp. 94. It was a case of ejectment, tried before Chief Justice KENYON in 1794. The full report of the case is as follows: The defendant had taken the house for the month, and a month's notice to quit had been given. It was agreed that the notice had reference, in all cases, to the letting, and that a month's notice was sufficient to entitle the plaintiff to recover.

In *Peacock v. Raffun*, 6 Esp. 4, tried before Lord ELLENBOROUGH in 1808, the Court remarked that a week's notice to quit was certainly sufficient where the holding was weekly.

In *Doe, d. Campbell, v. Scott*, 6 Bing. 362, the same rule was, in 1830, recognized by the Court of Common Pleas. The rule was incorporated in the text of the books of authority upon this subject as the law, and may be considered as settled both in England and in this country, excepting where the matter of notice has been the subject of statutory regulation: *Prindle v. Anderson*, 19 Wend. 391; s. c., 23 Wend. 616; *Seem v. McLees*, 24 Ill. 192; *Walker v. Sharpe*, 14 Allen, 43.

The common-law rule, I take to be undoubted, that notice is necessary to determine a monthly or weekly renting, and that a month's or week's notice, respectively, is sufficient.

2. It is said that the notice in this case is insufficient, because the day for quitting named in the notice was the first of August, and not the last day of July.

The point made is, that according to the statement of the affidavit, the term originally commenced on the 1st day of May, and, by the usual mode of computation, it determined on the last day of the month. So, throughout the tenancy, the recurring periods each terminated on the last day of each month. It is, therefore, urged that the notice was given to quit on a day subsequent to the last day of the term, and that then a new term had commenced to run, and that, therefore, the tenants holding must continue until determined by a new notice: *Taylor on Land. and Ten.*, § 477.

It is true that the notice required to determine these tenancies must be given to quit at the end of a period. When a term has commenced without such notice, the tenant is entitled to remain during and bound to pay for the term.

A notice given to quit in the middle of a term is ineffectual: *Archb. on Land. and Ten.* 86; *Taylor on Land. and Ten.*, § 476. But no case has been cited which supports the position of the prosecutor, or the statement of Mr. Taylor in § 457 of his work. The cases in the State of Massachusetts are put upon the construction of their statute concerning notices in cases of uncertain tenancy, with rent payable at designated intervals: *Walker v. Sharpe*, *supra*.

The question whether the day mentioned in the letting is to be computed or not is frequently involved in cases of suits for trespass and in actions in which the length of a notice is in question. In such instances nice distinctions have been taken, relative to the language of the letting, whether the term is to commence "on," or "from," or "from the date," or "from the day of the date:" *Wilcox v. Wood*, 9 Wend. 345; *Sheets v. Sheldon's Lessee*, 2 Wall. 177; *Pugh v. Duke of Leeds, Cowper*, 714.

If the notice was short by one day, in case the month's tenancy expired on the last day of July, or if an action of trespass was pending for the tenant's occupancy on the 1st day

of August, the question of computation of the first day might be material. But no case, I think, can be found which holds that the notice to quit is invalid merely because it names, as the day to quit, a day which corresponds in date with the day named in the original letting, whatever the words of the letting.

In England the letting was usually from and to certain feast-days, and the tenant usually entered and quit on those days, and the notices to quit named that day. In *Doe, ex dem. Eyre, v. Lambly*, 2 Esp. 635, the tenant told the purchaser of the reversion that his tenancy commenced on Lady-day, and notice was given to quit on that day. No objection was raised on the ground that notice should have been given to quit on the preceding day, but it was attempted to show that the term actually commenced at another period, which was not allowed, on the ground that the tenant was estopped.

In *Kemp v. Derrett*, 3 Camp. 510, the defendant became tenant on the 29th of October, 1810. On that agreement, Lord ELLENBOROUGH held it to be a tenancy from three months to three months, and said that, therefore, a notice expiring at the end of any quarter from the time of entry would have been sufficient to determine the tenancy. He said that the notices should have expired on the 29th of January, or on the 29th of April, or on the 29th of July.

The following cases show that it was almost the uniform custom to name the day corresponding with the date of the letting and entry of the tenant as the time for quitting, and in these cases no objection seems to have been raised to the sufficiency of the notices on that ground : *Roe v. Ward*, 1 H. Black, 97 ; *Doe v. Weller*, 7 Term R. 478 ; *Mills v. Goff*, 14 M. & W. 72 ; *Doe, d. Cornwall, v. Matthews*, 11 C. B. 675.

And in *Den, ex dem. Finlayson, v. Bayley*, 5 C. & P. 67, this seems to have been the idea of the Court as to the notice in a weekly tenancy.

By strict computation, the term set out by the present affidavit probably terminated on the last midnight of July. I think it would be carrying the rule that a notice to quit must be made with reference to the end of the term, to an illogical

and unreasonable length to hold that a notice given for the day commencing at that midnight is not a good notice. The law is ignorant of fractions of a day. The notice covers all and any period of the twenty-four hours from midnight to midnight. The very moment the tenancy expires the tenant is confronted with a direction to quit. On what process of reasoning can it be said that a new term has commenced before notice is given.

There is another foundation which I think the landlord might have erected to support the validity of his notice, and that is usage. The bulk of the letting, in cities, is in connection with houses used for that purpose only. The constant interchange of tenants and tenements compels simultaneous moving. A strict construction of leases would often compel general movements at midnight. Of course, nothing so absurd is conceivable in practice. I am quite sure that a usage could be shown for the out-going tenant to remove and the incoming tenant to enter on the same day, and that day corresponding with the first day of the various terms. Unless this usage was controlled by express words in the lease the Courts would enforce it: *Wilcox v. Wood, supra.*

Without regard to this, as it was not in evidence, I think the notice was sufficient.

In the third place, it is found by the Court below, as a matter of fact, that the agreement for the monthly letting was made on Sunday. It was also found as a fact that the agreement was subsequently ratified by the parties. No subsequent contract, relative to the terms of the letting, appears in the case.

The doctrine enunciated in the case of *Butcher v. Reeves*, 2 Vroom, 224, was that no vitality could be imparted to a Sunday contract by ratification. Whether the words spoken on Sunday could be resorted to in any event for the purpose of showing the character of the tenancy, is very questionable.

Its determination is not essential because, upon another fact shown in the case, I think, without any reference to the original contract, a tenancy by the month arises; and that fact is,

that the payment of the rent was monthly. Where it appears that there is an annual rental reserved, and the payment is to be made by the quarter or month or week, then the renting is a yearly letting, without regard to the periods of payment. But where there is no such letting, and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or weekly one, just as the payment is monthly or weekly: *Peacock v. Raffun, supra*; *Anderson v. Prindle, supra*; 23 Wend. 616; *Witt v. Mayor, etc., of New York*, 6 Rob. N. Y. 441.

Upon reaching this conclusion, it follows that the proceeding below must be affirmed, with costs.

*Baker v. Adams*, 5 Cush. 99; *Eastman v. Vetter*, 58 N. W. R. 989; *Shirk v. Hoffman*, 58 N. W. R. 990; *McFall v. McFall*, 14 S. E. R. 985.

## C

## ESTATES AT WILL.

An estate at will is the interest one has in lands after entry, where he is to hold during the joint wills of himself and the lessor.

## a

BURNS *v. BRYANT*,  
Court of Appeals, New York, 1865.  
31 N. Y. 453.

One Eaton told defendant that he might use certain premises until they were wanted, but must then surrender possession. Defendant entered, and never paid any compensation for the premises. Afterward, Jan. 24, 1859, Eaton gave Bryant written notice to quit, and on Feb. 21, 1859, Eaton leased the premises to Burns for a year, who took possession and put in the crops, and in May and June, defendant plowed up the crops, for which trespass Burns brings this action.

CAMPBELL, J. The defendant was in possession, holding for no particular time, paying no rent, making no compensa-

tion for the use of the land, but under agreement to surrender the premises whenever the landlord should require the possession. He was clearly a tenant at will: *Post v. Post*, 14 Barb., 253, and cases and authorities cited there. As such tenant at will the defendant was entitled to one month's notice to quit and surrender the premises: 3 R. S., 5th ed., p. 35, §§ 7, 8, 9. The duration of the tenancy is uncertain, and the landlord cannot eject the tenant summarily. He has one calendar month in which to make his arrangements to remove. The form of the notice is not prescribed further than it must require the tenant to remove from the premises, and it must be in writing. The 9th section declares that "at the expiration of one month from the service of such notice the landlord may re-enter, etc." In this case, the premises being unoccupied at the time, the landlord re-entered by the plaintiff before the expiration of the month. But the trespasses were not committed till May and June following, two or three months after the month had expired. The fact that the notice was served on the 24th of January, requiring the tenant to remove on the 20th of February, could make no difference, as there is no claim for trespasses committed prior to the 24th of February. All the defendant was entitled to was one month's notice to quit. It could make no difference that a specific day was fixed in the notice. The statute would still give him the month in which to make his preparations to remove. This month had long expired when the defendant virtually undertook to re-enter himself, as against his landlord, claiming that his tenancy had not terminated.

It seems to me very clear that there was no foundation for such a claim on the part of the defendant.

This judgment should be affirmed.

WILLIAMS, R. P. 388; 2 Bl. Comm. 146. It is at the will of both parties: *Richardson v. Langridge*, 4 Taunt. 129.

## b

**How Created.**

An estate at will may be created by express words, or by implication of law, as where one enters land by permission of the vendor under a contract to purchase, and the vendor afterward refuses to convey the premises. In such case the party in possession is a tenant at will, and is entitled to emblements.

HARRIS *v.* FRINK,  
Court of Appeals, New York, 1872.  
49 N. Y. 24.

Where Harris took possession of land by consent of Frink under a parol agreement to purchase. Harris sowed the land to oats, and was prevented from harvesting them by Frink's agents, who entered the land and cut the oats. Harris brings this action to recover possession of the grain.

RAPALLO, J. The crop of oats in controversy was alleged, in the opening of the plaintiff's counsel, to have been sowed by the plaintiff while in possession of the land under a parol contract of purchase. It was also offered to be shown that the crop was raised with the consent of the vendor, it having been a part of the agreement that the plaintiff should go into immediate possession of the farm, and work it until the defendants, who were the agents of the vendor, should be ready to carry out the agreement of sale; that the defendants assisted the plaintiff in putting in the crop, receiving pay from him for their work as hired men by the day; that afterward, in the month of May, the defendants expelled the plaintiff from the farm and repossessed themselves of it, and the vendor refused to convey pursuant to the agreement; that, when the crop was ripe, the plaintiff commenced harvesting it, but was driven off by the defendants, who took possession of the oats and harvested them. The plaintiff also offered to prove that the defendants had admitted that the crop belonged to him. The Judge, at the trial, non-suited the plaintiff on this opening, and exception was duly taken.

No question appears to have been made as to the authority of the defendants to represent and act for the vendor, who was

their brother; but the non-suit appears to have been granted and sustained at general term on the ground that the crop was part of the realty, and that the plaintiff, having no legal title to the land, could have none to the crop; that he was not a tenant, for the reason that no action would lie against him for use and occupation; and further, that having been ejected and kept out of possession of the land, he could not maintain any action for taking the crop when he was out of possession.

The contract of sale, not being in writing, was void by the statute of frauds; but the plaintiff's possession under it was lawful, so long as he made no default. He was in possession under a parol license from the owner to occupy and work the farm until a conveyance should be executed pursuant to the agreement of sale. The invalidity of that agreement enabled the vendor to revoke the license at any time. It did not vest in the plaintiff the title to the land, but does it necessarily follow that he acquired no title to the crop which he had sown in reliance upon the owner's permission to occupy and work the farm? Under some circumstances a growing crop is part of the realty and passes with it; but in many cases it is treated as a chattel. It may be owned by one person, while the title to the land is wholly in another, and this result may be brought about either by operation of law or by express contract. When planted by the owner of the soil it constitutes in general part of the realty and will pass to the vendee by a conveyance of the land; but the owner of the soil may sell a crop to be cut without conveying any interest in the land, and the purchaser will acquire title to it as a chattel, even though not fit for harvest at the time of the sale: *Evans v. Roberts*, 5 B. & C. 829; *Jones v. Flint*, 10 A. & E. 753; *Samsbury v. Matthews*, 4 M. & W. 343; *Craddock v. Riddlesbarger*, 2 Dana, 206; *Newcomb v. Ramer*, 2 J. R. 421, note *a*; *Austin v. Sawyer*, 9 Cow. 39, 42, 43. So if a lessor covenants with a lessee for years that he shall have the emblements, the property in the corn is well transferred, though it be not severed during the term: *Hobart*, 175.

And it is not necessary to the validity of an agreement by

the owner of the soil, whereby another acquires an interest in the crops, that the relation of landlord and tenant should exist between them. An agreement to allow one to work land on shares for a single crop is no lease of the land ; but the parties to such an agreement become tenants in common of the crop. They acquire a joint property in the growing crop and may unite in an action of trespass *de bonis* for cutting and carrying it away : *Foot v. Litchfield*, 3 Johns. 216, 221 ; *Moulton v. Robinson*, 7 Foster, 550 ; while in such a case the owner of the land alone can bring trespass for breaking the close : *Cro. Eliz.* 143 ; 8 Johns. 151.

So, where the owner of land agreed by parol that one Hatch might use it so long as would be sufficient to compensate him for clearing it, and Hatch planted a crop of wheat, which was levied upon in December as wheat in the ground, upon an execution against Hatch, the occupant, it was held that the wheat was a chattel and the levy good and sufficient to authorize the sheriff to harvest the wheat in the following August : *Whipple v. Foot*, 2 Johns. R. 418.

In *Green v. Armstrong*, 1 Denio, 554, 556, numerous cases are cited showing that growing crops, which are the produce of manual labor and cultivation, may be conveyed by verbal contract as goods and chattels and sold on execution, and that trover may be maintained for them against one in possession of the land : *Dunne v. Ferguson*, 1 Hayes, 542 ; see, also, *Austin v. Sawyer*, 9 Cow. 39, 42. And they may be mortgaged by one out of possession of the premises : *Fry v. Miller*, 45 Pa. St. 441 ; *Stewart v. Doughty*, 9 Johns. 108.

Not crops only, but other things attached to the realty by one not owning the land, but with the consent of such owner, are frequently treated as chattels : *Lancaster v. Eve*, 5 C. B., N. S. 727 ; *Dame v. Dame*, 38 N. H. 429, and authorities cited ; *Smith v. Benson*, 1 Hill, 176 ; *Russell v. Richards*, 10 Maine, 429 ; 35 N. H. 480 ; 27 Pa. St. 291. And buildings erected with the consent of the owner of the land by one in possession under a parol contract of sale, have been held to be the personal property of the party erecting them : *Yates v. Mullin*,

23 Ind. 562. Where a chattel has been annexed to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether it does so or not may be a question on the evidence, and the jury may infer, from circumstances, an agreement that the owner of the chattel should have liberty to take it away: *Wood v. Hewett*, 8 Adol. & Ell., N. S. 913.

From the verbal agreement set forth in the opening, that the plaintiff might work the land, in connection with the fact that the crop was sown with the consent and assistance of the defendants, who were the agents of the owner of the land, and that they were paid for their services by the plaintiff, the jury might infer an agreement that the crop thus sown should belong to the plaintiff. If such was the agreement, it did not become part of the realty, but remained the personal property of the plaintiff. If an owner of land can, by a parol agreement to work on shares, vest in another the title to half or a greater share of a crop raised on his land, or can sell the crop growing, why can he not agree that the party raising the crop shall have the whole of it? If, by making such an agreement, he induces the other to expend his labor and his money, there is no want of consideration for the contract, and I can see no legal objection to giving effect to it.

The invalidity of the parol agreement to sell and convey the land, did not affect the plaintiff's title to the crop. If the agreement had remained executory in all its parts, of course none of its stipulations could have been separately enforced, though if standing alone they might have been valid. But although, by reason of the entirety of the contract, the plaintiff could not have enforced the stipulation allowing him to possess and work the farm, so long as it remained executory, yet, after it had been so far executed that the crop had been sown and was growing, the invalidity of the other provisions of the contract, under the statute of frauds, could not be invoked by the party who refused to complete, as against the party not in default, for the purpose of invalidating that part

of the contract which had been executed, and divesting the plaintiff's title to the crop raised in pursuance of it. The plaintiff was not in default, and was not the party asserting the invalidity of the contract. For aught that appears he was, when ejected, ready and willing to complete the performance of it. He therefore could not be compelled to relinquish any benefit he had acquired from its partial performance: *Dowdle v. Camp*, 12 Johns. 451; *Abbott v. Draper*, 4 Den. 51, 53; *Collier v. Coates*, 17 Barb. 471, and cases cited; *Erben v. Lorillard*, 19 N. Y. 302, 304; 7 Cow. 92; 1 Pick. 328; 20 Ib. 142; *King v. Brown*, 2 Hill, 489; *Lockwood v. Barnes*, 3 Ib. 128; *Bennett v. Scutt*, 18 Barb. 347. In *Ex'r's of Pierrepont v. Barnard*, 2 Seld. 279, the purchaser was allowed to carry off and retain timber actually cut in pursuance of the parol license of the vendor, though as to the timber not cut the agreement was void, under the statute of frauds, and therefore but a revocable license. The crop was the product of the plaintiff's labor and money, expended while he was in possession of the land under the agreement. That possession was originally lawful, and the plaintiff had done no act and committed no default rendering it tortious. The jury could have found that the crop was raised by the plaintiff for his own benefit, with the consent of the vendor of the land. It had not, under those circumstances, become part of the realty as between the plaintiff and the party under whom he held, but was, from the time it was sown, a chattel belonging to the plaintiff, the title to which had never been transferred to the owner of the soil or to the defendants. It could have been lawfully levied upon on execution against the plaintiff: 2 Johns. 418, 421; 9 Ib. 112. And if the facts are as stated in the opening, the plaintiff had the same right to it which he would have to any chattel which he might, during his temporary possession, have placed upon the land by consent of the owner, and which remained there when he was ejected: 1 Hill, 176.

The re-entry by the defendants upon the land did not deprive the plaintiff of his title to the crop as personality. The

defendants are alleged to have been the agents of the owner and vendor of the land, with whom the plaintiff had contracted. There is nothing to show that their entry was adverse to such owner, or that it was not in his right and behalf. If the entry had been by a stranger, and adverse not only to the plaintiff but to the party through whose contract his right to the crop as personality was derived, such an entry might have had the effect claimed. A crop may be personality as to one party and not as to another. As between landlord and tenant, it is personality during the term, or even after its expiration, if the term is determinable at will, or if the lessor has agreed that the tenant shall have the crop: Hobart, 175. But as between the tenant and one claiming under the foreclosure of a mortgage of the landlord made prior to the lease, it goes with the realty: 1 B. Ch. 613; 2 Den. 174. And such is the case wherever the question arises between one who has cultivated the crop and one who enters by title paramount to the party by whose consent the property was cultivated. There is no privity between them: *Lane v. King*, 8 Wend. 584. And the same results follows from the disseisin by a third party of the party by whose consent the land was cultivated. Where land is cultivated on shares, the owner of the land and the party who works it are tenants in common of the crop as a chattel. But if the owner of the land is disseised while the crop is growing, the right to the crop as a chattel ceases. If cut by the disseisor, replevin for it cannot be maintained as against him by either of the owners of the crop: *Demott v. Hagerman*, 8 Cow. 220. But similar consequences would not follow from the mere exclusion of the sower of the crop by the owner of the land with whom he had contracted. Such an exclusion would not destroy the privity between the parties, and the character of the property would not, thereby, be changed. If it could, every owner whose land is worked on shares, could, by his own wrongful act, divest the party, with whom he has contracted, of his title to the products of his labor.

It is urged by the respondent that, by part performance of the contract of sale, the plaintiff had become entitled to spe-

cific performance in equity ; that, therefore, he had an equitable title to the land when he sowed the crop, and it consequently became part of the realty.

We do not think that it lies with the defendants to assert this equity. It is clear that the plaintiff had not the legal title to the land ; and the allegation was that the vendor, in whose behalf the defendants acted, refused to perform the contract to sell. Neither he nor the defendants appear to have recognized any equitable title to the land in the plaintiff and they should not, after having ejected him, be allowed to set it up for the purpose of depriving him of his property which they have appropriated. Furthermore, the equitable seisin of a vendee before conveyance is, in general, recognized where a conveyance is finally decreed or made, and dates by relation from the time he was entitled to a conveyance. Here the contract was never enforced or performed.

I have, thus far, examined the case without reference to the position of the plaintiff's counsel, that the plaintiff, having entered upon the land with the license and permission of the owner to occupy and work it, became a tenant at will ; and, as such, entitled to the emblements : Co. Litt. 55 b, notwithstanding that he entered under a contract of purchase.

The simplest form of a tenancy at will was where one man let to another to hold at the will of the lessor : Co. Litt., § 68. But the tenancy at will may be created otherwise than by express contract ; it may arise by implication : Craft on Real Prop., § 1544. And an obligation to pay rent is not a necessary incident of such a tenancy. Where one enters by permission of the owner for an indefinite period, and without the reservation of any rent, he is, by implication of law, a tenant at will : *Doe v. Baker*, 4 Dev. N. C. 220. If he be placed upon the land without any terms prescribed or rent reserved, and as a mere occupier, he is strictly a tenant at will : *Jackson v. Bradt*, 2 Caine's R. 174 ; 4 K. C. 114-125, 11th ed. ; *Post v. Post*, 14 Barb. 253 ; *Burns v. Bryant*, 31 N. Y. 453. Where a householder permitted another to occupy, rent free, the occupant was held to be a tenant at will : *Rex v. Collett*, Russ. &

Ry. 498; *Jackson v. Bryan*, 1 Johns. 322, and would be entitled to emblements: *Doe v. Price*, 9 Bing. 357, 358. A parol gift of land creates a tenancy at will: *Jackson v. Rogers*, 1 Johns. Cas. 33; s. c., 2 Caine's Cases, 314. And there is much authority in favor of the position, that one who is let into possession under a contract to purchase is strictly a tenant at will: Washburn on Real Property, 511, 513, 515, 3d ed.; *Howard v. Shaw*, 8 M. & W. 118-122; *Waring v. King*, Ib. 571; *Doe v. Miller*, 5 Car. & P. 595; *Doe v. Chamberlaine*, 5 M. & W. 14; *Right v. Beard*, 13 East, 210; *Gould v. Thompson*, 4 Met. 224; 12 Mass. 325. And he has the right of ingress and egress to remove his effects: *Love v. Edmonston*, 1 Iredell (N. C.) 152; *Jones v. Jones*, 2 Rich. L. R. (S. C.) 542; *Doe v. Baker*, 4 Dev. 220; *Manchester v. Doddridge*, 3 Iredell, 360; *Lowry v. Tew*, 3 Barb. Ch. 414; 5 Wend. 29. He is not liable for rent, because a promise to pay rent cannot be implied in such a case, the tenant having entered under a different contract: *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 13 Ib. 489; *Winterbottom v. Ingham*, 7 Q. B. 611. But, nevertheless, he is a tenant at will: *Howard v. Shaw*, 8 M. & W. 122. And he is not entitled to notice to quit if he makes default in his contract: *Jackson v. Miller*, 7 Cow. 747. A tenant strictly at will was not, prior to the Revised Statutes, entitled to notice to quit: *Jackson v. Bradt*, 2 Caine's R. 169; *Doe v. Baker*, 4 Dev. 220; *Jackson v. Bryan*, 1 Johns. 322; 13 Maine, 214; 2 Esp. 717; Crabb on Real Property, § 1559; *Post v. Post*, 14 Barb. 253. From considerations of equity, tenancies at will were, under certain circumstances, treated by the Courts as tenancies from year to year merely for the sake of notice to quit: 4 Cow. 350. This is called by Chancellor KENT a species of judicial legislation: 4 K. C. 127, 11th ed.; *Jackson v. Bryan*, 1 Johns. 322. But this indulgence was not extended to a tenancy at will created by entry under a parol contract of purchase: 7 Cowen, 751, 752; *Suffern v. Townsend*, 9 Johns. 35; 9 Ib. 331. In England, a tenant at will by entry under a contract of purchase is not entitled to notice to quit at a future time; but, unless he does some wrongful act

to terminate the tenancy, he cannot be treated as a trespasser or sued in ejectment without a demand of possession: 5 Carr. & P. 595; 13 East, 210; 5 M. & W. 14. If he makes default in his contract of purchase or commits waste, or in any other manner terminates the tenancy by his own wrongful act, he becomes a trespasser, and may be sued as such or in ejectment, and he cannot dispute the title of the party under whom he entered: *Cooper v. Stower*, 9 Johns. 331; *Doolittle v. Eddy*, 7 Barb. 74; 1 Wend. 418; 5 Ib. 30; 6 Johns. 34, 49; and he would, no doubt, forfeit his right to emblements under those circumstances: Co. Litt. 55 b.

Expressions are to be found in some of the authorities cited, to the effect that one entering under a contract of purchase does not stand in the relation of tenant to the vendor: 6 Johns. 46; 13 Ib. 489. These expressions are used, however, in reference to the question whether an undertaking to pay rent can be implied. But where a purchaser of a farm enters upon it under an express agreement of the vendor that he may occupy and work it until the vendor is prepared to convey, and the agreement to sell is merely by parol, and the question arises with reference to the rights of such an occupant, in case of a refusal of the vendor to perform, and a termination by him of the occupancy, without any default on the part of the occupant, there is strong reason for according to such occupant the rights of a tenant at will. The permission to occupy, unaccompanied by any contract of sale, would clearly create a tenancy at will: 31 N. Y. 453; 2 Caine's R. 174, and cases *supra*. The effect of the invalidity of the contract of sale is to reduce the right of the vendee to that of a mere licensee, and to enable the vendor to revoke the license at his pleasure. When he exercises that right there is no injustice in placing him in the same position as if the contract of sale which he repudiates had not been made. The holding, from the beginning, was, in fact, at his will; and the principles upon which emblements are allowed to a tenant at will would seem applicable to such a case: *Comyns' Dig.*, Title Biens. G. 2; Co. Litt. 55 a, 55 b.

The plaintiff further offered to prove an admission by the defendants that the crop belonged to him. In *Austin v. Sawyer*, 9 Cow. 39, 43, a similar admission was held sufficient to authorize the jury to presume a formal and valid sale of the crop to the plaintiff without any other evidence. The admission in that case was made by the defendant's grantor at the time of conveying the land to the defendant. Here it was alleged to have been made by the defendants personally.

We think the non-suit was erroneous, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

CHURCH, C. J., and PECKHAM, J., concur.

ALLEN, J., concurs in result on first ground discussed; dissenting from proposition that plaintiff was tenant at will.

GROVER, J., dissents. FOLGER, J., absent.

Judgment reversed.

Where no term is fixed in a lease the lessee is a tenant at will, and he may terminate his tenancy by proceeding as directed by statute: Minn. Gen. Stat. 1878, ch. 75, § 40; *Sanford v. Johnson*, 24 Minn. 172. Estates at will exist at the will of both parties, but they may be determined by the will of either party: *Knight v. Indiana Coal Co.*, 47 Ind. 105, 111. If the owner of land permits another to occupy it without any lease or agreement to pay rent, and such person merely takes care of it for the owner, an estate at will is thereby created: *Jones v. Shay*, 50 Cal. 508.

## C

### Termination.

An estate at will may be terminated by either party, or by implication of law, as upon the death of one of the parties.

SAY v. STODDARD,  
Supreme Court of Ohio, 1875.  
27 Ohio St. 478.

SCOTT, C. J. The contract of lease between Stoddard, Sr., and Celey, set out in the petition in the Court below, created, by its express terms, a tenancy at will.

True, the rent was to be \$13.00 a month, and was to be

paid by Stoddard & Co, out of Celey's wages, monthly or half monthly, as might be most convenient. But the renting was to continue for "so long as the parties shall mutually agree to continue the renting under this agreement." And, again: "Either party may put an end to said renting by giving the other party four days' notice, in writing, that this renting is to cease at the expiration of four days from the service of such notice on the other party." It is clear, from this language, that the tenant was to hold at the will of the lessor, though while the tenancy continued the rent was to be paid monthly or half-monthly. The character of the tenancy is not affected by the fact that four days' notice of its determination, is provided for in the contract; for in a general tenancy at will, reasonable notice must be given by the party whose will determines it, to the other party; and the contract here fixes the length of that notice. It is said by Blackstone: "An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession:" 2 Bl. Com. 145; Litt., § 68. Such tenant has no certain indefeasible estate, nothing that can be assigned by him to any other, because the lessor may determine his will, and put him out whenever he pleases: 2 Bl. Com. 145; Taylor's Landl. and Ten. 48.

Tenancy at will may be determined by implication of law. Such implication will arise on the death of either of the parties. So, if a tenant at will assigns over his estate to another who enters on the land he is a disseisor, and the landlord may have an action of trespass against him: Greenl. Cruise on R. Pr. 244; Taylor's Landl. and Ten. 48.

So, also, a desertion of the premises by the lessee, puts an end to the tenancy at will. For he thereby discontinues his lawful possession and terminates his relation to his lessor, which is only of a personal character, and he ceases to have any interest in the premises which he can transfer or control.

The plaintiff shows, by his petition, that Stoddard, the lessor, died November 1, 1869, leaving the defendant his devisee of the premises. Celey, the lessee, continued in possession till

December 1, when he undertook to sublet a part of the premises to the plaintiff. It is not alleged that the defendant assented to this continuance of possession, or subletting. On the 7th of December, the lessee, Celey, removed wholly from the premises; and, eight days afterward, the grievances occurred of which the plaintiff complains. As against the defendant, the plaintiff acquired no rights by his contract with Celey, for the latter had none which he could transfer. The facts stated do not show that the relation of landlord and tenant was ever created between the parties to this suit. There was neither privity of estate, nor of contract between them. And the acts complained of were but the lawful exercise of the rights incident to the defendant's ownership of the premises, and are not charged to have been attended with any unnecessary interference either with the plaintiff's person or property.

We think the Court below properly sustained the demurrer to the plaintiff's petition, and its judgment is affirmed.

By notice: *Doe v. Richards*, 4 Ind. 374; *Price v. Price*, 9 Bing. 356 (23 Eng. Com. Law, 614). Waste by the lessee: *Daniels v. Pond*, 21 Pick. 367. Desertion of premises: *Chandler v. Thurston*, 10 Pick. 205. Lessee claiming title: *Walden v. Bodley*, 14 Pet. 156. Not assignable: *Cunningham v. Holton*, 55 Maine, 33. As to notice to quit, see: Minn. Gen. Stats. 1878, ch. 75, § 40.

## D

### ESTATES AT SUFFERANCE.

An estate at sufferance is created when a person comes into possession of land lawfully, but holds over wrongfully after his estate therein has terminated.

RUSSELL *v. FABYAN*,  
Supreme Judicial Court of New Hampshire, 1856.

34 N. H. 218.

BELL, J. Fabyan entered into possession of the premises in question under a written lease, to continue for five years

from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseisor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance: 2 Bla. Com. 150; 4 Kent Com. 116; *Livingston v. Tanner*, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor, or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease: *Conway v. Starkweather*, 1 Denio, 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseisor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at sufferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseisor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong: *Delaney v. Ga Nun*, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire it becomes material to inquire what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he *retains* the possession as a wrong-doer, just as a disseisor *acquires and retains* his possession by wrong: *Den v. Adams*, 7 Hals. 99; 2 Bla. Com. 150; 4 Kent Com. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner: 10 Vin. Ab. 416, Estate, D, C, 2.

If no such assent appears, the tenant is entitled to no notice to quit: *Jackson v. McLeod*, 12 Barb. 483; 12 Johns. 182; 1 Cru. Dig., tit. 9, § 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action: *Livingston v. Tanner*, 12 Barb. 483; *Den v. Adams*, 7 Hals. 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as we held in *Preston v. Love, Noy*, 120; 10 Vin. Ab. 416.

We have been able to discover but one point of difference between the case of the disseisor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance until he has entered upon the premises: 4 Kent Com. 116; a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseisor and unqualified wrong-doer.

By Stat. 6 Anne, chap. 31, made perpetual 10 Anne, chap. 14 (1708, 1712), no action or process whatever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin : Co. Litt. 67, n. 377 ; 3 Bla. Com. 228, n. ; 1 Com. Dig. 209, Action for Negligence, A, 6. It is not necessary to consider whether this statute has been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseisor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseisor is liable for any damage occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseisor.

II. Assuming that Fabyan is liable for the loss of these buildings, the question arises, whether he is liable in this form of action ; and, as we have remarked, he is not liable in trespass. Chancellor KENT (4 Com. 116), says : "A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlord, nor is he entitled to notice to quit ; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. *But before entry he cannot maintain an action of trespass against the tenant by sufferance.*" 1 Cru. Dig., tit. 9, chap. 2 ; Rising *v.* Stanard, 17 Mass. 282 ; Keay *v.* Goodwin, 16 Mass. 1, 4 ; 2 Bla. Com. 150 ; Co. Litt. 57, b ; Livingston *v.* Tanner, 12 Barb. 483 ; Trevillian *v.* Andrew, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of *trespass on the case*. There is no evidence of any

entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of *West v. Trende*, Cro. Car. 187; s. c., Jones, 124, 224, is a decision that case lies in such a case.

"Action upon the case. Whereas he was and yet is possessed of a lease for divers years *ad tunc et adhuc ventur*, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during the time pulled down the windows, etc. Stone moved in arrest of judgment that this action lies not, for it was the plaintiff's folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should have an action, it should be an action of trespass, as Littleton, § 71. If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the Court conceived that an action of trespass or an action upon the case may well be brought, at the plaintiff's election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff."

III. It seems clear that if Fabyan is to be regarded as a wrong-doer in retaining the possession of the plaintiff's property after his lease had expired, all who aided, assisted, encouraged, or employed him to retain this possession, must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession, than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it

seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan, so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the Court have not been furnished with a copy.

IV. The case of *Russell v. Fabyan*, 7 Foster, 529, is not to be regarded as a decision of the question raised in this case, in relation to a sale of a supposed right of redemption as belonging to Burnham, after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose whether, if Russell's deed proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer, by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be discharged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor, or by some one who had a paramount title to his; a mere outstanding title not put in exercise is not a defense. The defendant relied on an eviction on the 14th of June, 1848, as his defense. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defense. And the Court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles stated

in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to inquire.

By our statute, every debtor whose land or any interest in land is sold or set off on execution, has a right to redeem by paying the appraised value, or sale price, with interest, within one year. Rev. Stat., chap. 195, § 13; chap. 196, § 5 (Comp. Stat. 501, 502). This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, that right of redemption is vested in his grantee, who, being the party interested (Rev. Stat., chap. 196, § 14), may redeem any sale or levy, if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time.

So, if there is no attachment upon the property at the time of the debtor's conveyance, but his creditors levy upon the property, upon the ground that his conveyance was not made in good faith, and upon an adequate consideration, and so is fraudulent and void as to them, the effect is the same. Any creditor may levy his execution upon the right of redemption of any prior levy or sale, the deed of the debtor being without legal operation to place either the property itself or any interest in it out of the reach of his process. And the right of redemption, so long as it retains any value in the judgment of any creditor, remains liable to his levy; but when the creditors have exhausted their legal remedies, the right of redemption, necessarily incident to every levy on real estate, still remains, and it is the right not of the debtor, but of his grantee, who may exercise it at his pleasure.

This we conceive was the position of the present case. The first levy by Dyer being founded on his attachment, took pre-

cedence of Russell's deed; but Russell had still the right to redeem as grantee of Burnham, whether his deed was valid as to creditors or not. When the right of redeeming the first levy was sold, on the ground that the deed to Russell was fraudulent and invalid, a right of redemption still remained to Russell, and he had a right, as a party interested in the land, to pay or tender the amount of the first levy to Dyer, and so to discharge it. By that payment or tender it was effectually discharged, whatever might be the rights or duties of Dyer, or Russell, or any one else, growing out of the sale of the right of redemption upon Dyer's second execution, which, being founded upon no attachment, was *prima facie* a nullity as to Russell, and was dependent for its effect upon the evidence that might be offered, showing Russell's deed void as to creditors.

The present case stands free from any question growing out of the relation of landlord and tenant, as that relation is not alleged, and the lease of Russell had expired, and Dyer had never stood in that relation. The evidence offered that Burnham's deed to Russell was fraudulent as to his creditors, is not open to any objection of that kind, which was held decisive in 7 Foster. If the facts warrant that defense, the evidence is competent; and if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy was good, if properly made, and the title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption.

As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be

A new trial.

WILLIAMS, R. P. 389; Smith *v.* Littlefield, 51 N. Y. 539. No notice to quit is necessary to terminate the estate, independent of statute: Jackson *v.* Parkhurst, 5 Johns. 128. The occupant is not liable for rent: Flood *v.* Flood, 1 Allen, 217. The occupant is not entitled to emblements: Doe *v.* Turner, 7 M. & W. 227.

## III

ESTATES AS TO THE TIME OF THEIR  
ENJOYMENT.

## A

## IN POSSESSION.

An estate in possession is one where the owner has an immediate right to the possession of the land.

## B

## IN EXPECTANCY.

Estates in expectancy are those where the right to the possession of the land is postponed to a future period, and are known as (1) Future Estates, and (2) Reversions.

## 1

## FUTURE ESTATES.

By virtue of statute, an estate in fee, as well as a lesser interest, may be limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

## a

## Without a Precedent Estate.

SABLEDOWSKY *v.* ARBUCKLE.

Supreme Court of Minnesota, 1892.

50 Minn. 475.

MICHELL, J. The trial Court found that the defendant, Alford J. Arbuckle, was the owner in fee of an undivided two twenty-firsts of the property in controversy and of a life estate in the other nineteen twenty-firsts, to commence at the death

of his father, Samuel C. Arbuckle, Sr.—the two twenty-firsts in fee by inheritance from his mother and the life estate in the remainder under the deed from his father (Exhibit A of answer), dated March 5, 1886. The correctness of these conclusions depends mainly upon two questions, one of law and one of fact, viz.: *First*, the construction and validity of the deed of March 5, 1886, from Samuel C. Arbuckle, Sr., to the defendant, Alford; and, *second*, whether said Alford was incompetent, by reason of mental incapacity, to execute the deeds (plaintiff's Exhibits A, C, and D) under which plaintiff claims.

1. By the deed of March 5, 1886, Samuel C. Arbuckle, Sr., reserving a life estate to himself, assumed to convey a life estate to his son Alford, to commence at his own death, with remainder to Marion Arbuckle, in trust for such persons as should take good, kind, and considerate care of said Alford until his (Alford's) death.

The trial Judge sustained the validity of this deed as a conveyance of a life estate to Alford, but held that its provisions as to the remainder were void. Plaintiff insists that the entire deed is void, because—*First*, a freehold estate to commence in the future cannot be created without a precedent particular estate to support it; and, *second*, the provisions of this deed are so dependent on each other that if part are void the whole are void.

At common law, the intervention of a particular precedent estate, created at the same time, was essential to the validity of a conveyance of an estate of freehold to commence at a future time. The reason was that, without the precedent estate, there could be no livery of seisin to support the remainder; and without livery of seisin no estate of freehold could be created: 2 Bl. Comm. 165; 4 Kent. Comm. 234.

Hence a conveyance of an estate in fee or for life, to commence at the death of the grantor (who reserved or retained a life estate to himself), would have been void if regarded as a feoffment or bargain and sale.

The Courts, however, succeeded in inventing a contrivance by which to uphold such conveyance by implying a covenant

on part of the grantor to stand seized of the lands to his own use during his life, and, after his decease, to the use of the grantee. Of course, they could not be upheld in this State on any such ground, for, under our statutes, there are no implied covenants, and such uses are abolished.

The reason why, at common law, a precedent estate was necessary to support a freehold estate to commence *in futuro* rested entirely upon the subtleties and technicalities of the feudal tenures of real property, which have no application in this State, where all lands are allodial, and not held of any superior. Consequently we are strongly inclined to the opinion that, even in the absence of any statute on the subject, it ought to be held that the common-law rule is not applicable, but that a conveyance of a freehold estate in land to commence at a future time is valid, although no precedent particular estate is created by the conveyance. There is no good reason in the nature of things why this ought not to be so, but our statutes recognize and impliedly authorize such conveyances. 1878 G. S., ch. 45, § 10, defines a future estate as one "limited to commence in possession at a future day, either *without the intervention of a precedent estate* or on the determination by lapse of time or otherwise of a precedent estate created at the same time." Sections 11 and 24 of the same chapter also clearly imply that a future estate may or may not be dependent upon a precedent estate.

The second ground upon which it is claimed that the entire deed is void is equally untenable. It is perfectly manifest that the single purpose of the grantor was to make provision for the care and support of his unfortunate son, who, because of physical and mental infirmities, had been incurably helpless, and wholly dependent on others from his birth.

This was the sole purpose of conveying him a life estate; and then, in order to hold out an inducement to others to be good and kind to the boy, he attempted to provide that upon his son's death the property should go to those who had taken good, kind, and considerate care of him during his life. It could hardly be claimed that if the father had known that

this last provision, intended to insure kindness to his son, would be held invalid, he would not have made the other provision which he did for his benefit.

Plaintiff invokes the application of the rule as to wills laid down in *Darling v. Rogers*, 22 Wend. 483-495, to wit: "that, when a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as from the whole testament taken together was evidently never the design of the testator; otherwise when the good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest." Tested by this rule, there is no room for doubt as to the effect to be given to this deed. The conveyance of the life estate to Alford, and the provision as to the remainder over, are in no way dependent upon each other. Had the grantor known that the provision as to the remainder was void he might have made other provision as to it, but, in view of the single purpose of the conveyance, it is to be presumed that in any event he would still have conveyed the life estate to his son.

2. Upon the issue of fact as to the competency of Alford to execute the deed conveying his interest in the property, all we deem necessary to say is that, after reading the evidence, we are clearly of opinion that it abundantly sustains the finding of the Court that he "was never at any time competent or had the mental or physical capacity requisite or necessary to execute or sign, or to authorize the execution or signing of said deeds, but that he is, and always has been, of imperfect and unsound mind, and wholly incapable of comprehending the force or effect of said deeds." Medical experts and others may testify as much as they please that his ailment is wholly physical and that his mind is sound; that it is "good soil," and only needs cultivation; but the stubborn facts remain apparent from the evidence that, because of this physical ailment, he has been almost entirely helpless from birth, and hence prevented from coming in contact with people and things; that he has not received a particle of education, and is, consequently, although of mature years, in a state of dense

ignorance, with as little idea of the nature of any business transaction and with his intellect (such as he has) as undeveloped as if he was a mere child. It is idle to claim that such a person had any adequate comprehension of the nature and effect of a conveyance of his real estate. This disposes of the two main questions in the case ; but there are several minor matters that require to be noticed.

The prior deed from Samuel C. Arbuckle, Sr., to William H. Arbuckle (through whom plaintiff also claims) cuts no figure in the case, for the reason that the Court finds that the deed to Alford was executed for a good and valuable consideration paid to the grantor, and that the grantee had no notice or knowledge of the prior deed to William H. Arbuckle. The correctness of these findings is not questioned by any of the assignments of error, and, as the deed to Alford was first recorded, it is protected by the provisions of the recording Act.

There is nothing in the point that the deeds from Alford should have been set aside or adjudged void only upon restitution of the consideration paid by the grantees. The decisions of the Courts, and sometimes even of the same Court, do not seem to be always entirely agreed as to whether in any case putting the grantee *in statu quo* can be made a condition precedent to setting aside the deed of a lunatic. Compare *Arnold v. Richmond Iron Works*, 1 Gray, 434, with *Gibson v. Soper*, 6 Gray, 279. But the doctrine of the cases most favorable to the plaintiff goes no further than to hold that the grantee must be put *in statu quo*, where the grantor was apparently of sound mind, and not known to be otherwise, and the transaction was in all respects fair and *bona fide*, and the grantor has received, and still has, the consideration of the deed.

In the present case plaintiff has not made one of these facts to appear. It does not appear that she or her grantors ever paid anything to the defendant Alford, or that he ever received a dollar for these conveyances. In fact, it appears affirmatively that he never did. Moreover, it is quite apparent, in view of the intimate relationship of the parties, that plaintiff and those under whom she claims must have been

perfectly cognizant of Alford's mental incapacity when they obtained the conveyances.

It would seem from the evidence that two twenty-firsts of this property still belong to Samuel C. Arbuckle, Jr., and hence that the Court was incorrect in holding that Alford has a life estate in nineteen twenty-firsts. But this is an error, if error it is, that does not affect the plaintiff, and as Samuel C. Arbuckle, Jr., is not a party to the action it cannot affect or bind him.

After the commencement of this action, upon the alleged mental condition of Alford being brought to its attention, the Court continued the case until his mental condition could be tested in the Probate Court upon an application for the appointment of a guardian for him. Thereupon proceedings were had in that Court by which a guardian of his person and estate was appointed, who subsequently answered for him in this suit. Upon the trial of this cause counsel for the defendant introduced in evidence the proceedings in Probate Court (and in the District Court on appeal), including the order or decree adjudging Alford's mental faculties to be imperfect, and that by reason thereof he was incompetent to have charge or management of his person or property, and ought to be placed under guardianship. The admission of this evidence is assigned as error. After reading the somewhat extended discussion between counsel and the trial Court when this evidence was offered, and examining the briefs of counsel in this Court, we are still left somewhat in the dark as to the purpose for which this evidence was offered, and as to the precise nature of the objection interposed to its admission. Defendant's idea seems to have been that, when taken in connection with other evidence showing that this same mental infirmity had existed without change from birth, this adjudication was competent to prove Alford's mental incapacity at the time of the execution of the deeds. And, as near as we can understand it, plaintiff's objection to the evidence was placed, not upon the ground that the adjudication was subsequent to and did not overreach the date of the execution of the deeds, but that it furnished no sufficient ground for avoid-

ing the conveyances, because a person's mental faculties might be so imperfect as to render him a fit subject for guardianship, and yet he not be mentally incapacitated to execute a deed. This is undoubtedly a correct proposition of law, but this would go to the weight, and not to the competency, of the adjudication as evidence of mental incapacity. The objection interposed was therefore not a good one. The adjudication was evidently not considered as conclusive, for the whole question of the defendant's actual mental condition at the time of the execution of the deeds was fully inquired into by parol evidence.

Judgment affirmed.

Ferguson v. Mason, 60 Wis. 377.

b

**With Precedent Estate.**

*Remainders.*

A remainder is created by act of parties and is "the remnant of an estate in lands or tenements, expectant on a particular estate created together with the same at one time." Remainders are either vested or contingent.

*Vested Remainders.*

A remainder is vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate.

**GREEN v. HEWITT.**

Supreme Court of Illinois, 1880.

97 Ill. 113.

The plaintiffs file a bill in equity for a partition of the lands mentioned in the opinion.

**MULKEY, J.** The whole controversy in this case turns upon the construction to be given to the second clause of the will of William C. Thompson, through which all the parties claim. It is as follows:

"Second. After the payment of such debts and funeral

expenses, I give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, situate in said county, and known and described as the north-east quarter of the south-west quarter of section seven, township fifteen, range thirteen, also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson."

Plaintiffs in error insist that under this provision of the will Elizabeth Thompson took an absolute fee-simple estate in the premises therein mentioned, which are the same lands now in controversy, and of which partition is sought by complainants' bill. If she did not take an inheritance, as contended, but a mere life estate, as is claimed by defendants in error, then it is clear complainants showed no title to the premises in themselves, and the demurrer to the bill was therefore properly sustained by the Court.

To us there seems no room for doubt as to the proper construction of the clause in question. The devise of the farm and personal estate is expressed in a single sentence, one clause of which relating to the land, and another to the personality. By their punctuation these clauses of the sentence are merely divided by a comma and are connected by the conjunctive adverb "also," which, in that connection signifies in *like manner*, or in addition to; that is, the testator gives and bequeaths the farm, and in like manner gives and bequeaths the personality. Then follows the qualifying or adverbial clause, "so long as she remains my widow," which is introduced for the purpose of limiting the entire gift, both of personality and realty, to the widowhood of the taker. He gives and bequeaths both only so long as she remains his widow. This is both the grammatical and legal construction of the sentence. The meaning is precisely the same as if the testator had said: "I give and bequeath to my beloved wife, so long as she remains my widow, the farm, etc., on which we now reside, and in like manner I give and bequeath to her all my personal estate." She took a mere life estate in the entire gift.

The misapprehension as to the legal effect of the devise doubtless grows out of the use of the expression "whatever remains" by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and cannot be permitted to override the clearly-expressed intention that the widow should take a life estate only.

As part of the estate devised was personality, it is but reasonable to suppose that some of it would be of that species of property whose value and use consist solely in its consumption, such as provisions, etc., and it was doubtless the intention and expectation of the testator that property of this character should and would be consumed by his widow, and of course not in existence when her estate terminated. It was also reasonable to suppose that if she lived long as his widow, some of the articles of personality would be worn out, lost or destroyed; hence, in making the limitation over, it was but natural and proper to use the expression "whatever remains." It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has.

It is further claimed by plaintiffs in error that the estate of the daughter was a contingent remainder, and that inasmuch as she died before the termination of the particular estate which supported it, it never vested at all. Counsel are entirely mistaken in this view. The estate of the daughter had not a single element in it that distinguishes a contingent from a vested remainder. There was certainly no uncertainty as to the person who was to take. It was Mary Thompson, the daughter, clearly. And the time of her taking in possession was equally certain, namely: when Elizabeth Thompson ceased to be the widow of the testator, whether it was effected by death or a second marriage.

A clearer example of a vested remainder could scarcely be conceived. But admitting, for argument's sake, plaintiffs in error are right upon this question, the admission is certainly

fatal to their right of recovery; for, if the daughter took a contingent remainder, of necessity the widow could not have taken a fee, and their right of recovery rests entirely upon the hypothesis that she took a fee-simple title under the will.

We are, in any view, clearly of opinion that the decree of the Circuit Court was right, and it is therefore affirmed.

Decree affirmed.

"If there is a *present right* to a *future possession*, though that right may be defeated by some future event contingent or certain, there is nevertheless a vested estate :" *Manderson v. Lukens*, 23 Pa. St. 31. *See, also, Olney v. Hull*, 21 Pick. 311; *Thompson v. Ludington*, 104 Mass. 193; *Moore v. Littel*, 41 N.Y. 66.

**To the same point.**

*In re OERTLE.*

Supreme Court of Minnesota, 1885.

34 Minn. 173.

An appeal from an order allowing the widow certain interests in the lands of her husband.

VANDERBURGH, J. The legal questions involved in this case arise upon the construction of the terms of the will of Charles Oertle, deceased, which, after provisions for the payment of debts, disposes of all the residue of his real and personal estate as follows: "I give, bequeath, and devise to my beloved wife, Josephine, all my real estate and personal property, without exception, of which I may be possessed at the time of my death, . . . to hold and possess during the term of her natural life for her own exclusive use and benefit. After the death of my said wife, any and all of the property and estate mentioned above, and which, or any part of the same then left by her, shall be divided among my children equally, share and share alike. As a special provision of this my last will and testament, I make this a condition that my said wife shall, out and from said property left her, provide for the maintenance and a good education of my children. And I hereby make,

constitute, and appoint Otto Winterer and Louis Horst executors of this my last will and testament, with power to sell and dispose of all the property, both real and personal, at public or private sale, at such time or times, and upon such terms, and in such manner, as to them shall seem meet."

The Probate Court adjudged and determined that the surviving wife was entitled to a life estate only in the property, real and personal, and further ordered that, before taking possession thereof, she execute a bond, to be approved by the Court, for the safe keeping and faithful accounting by her of the property or capital fund received by her, to the end that the same might be turned over unimpaired to the children of the testator. Upon appeal, the judgment of the Probate Court was so far modified that it was ordered that the widow should "have power and authority to use, consume, and expend such part and portion of said property as may be necessary for her exclusive use and benefit during the term of her natural life, and to provide for the maintenance and good education of said children; but that said executors have the sole and exclusive power to sell any of said property at any time during her life; and that in case of such sale they deliver the proceeds thereof to her, and take her receipt therefor, and file the same in the office of said Judge of probate." In place of the bond required by the Probate Court, it was ordered, upon her consent, that the widow file a bond with sufficient sureties for the maintenance and education of the children, and that an inventory of the property, real and personal, turned over to her by the executors, received by her, be also filed with that Court. It was further ordered that upon her death all of the property, or any part of the same left by her, or the proceeds thereof, be divided among the children, share and share alike.

The questions involved require a careful consideration of the several clauses of the will. A power of sale is vested in the executors, to be exercised in their sound discretion. They are, however, given no other authority or control over the property, and have no active trust to execute in or about the same. They have simply a naked power of sale, and the

title passed subject to the exercise of such power : *Tobias v. Ketchum*, 32 N. Y. 319, 329. As respects the real property, a life estate vested in the wife, and a remainder in fee in the children, subject to be defeated by a sale : Gen. St. 1878, c. 45, §§ 13, 33 ; *Ackerman v. Gorton*, 67 N. Y. 63. The same rule is applicable to the personalty ; and interests for life and in expectancy may be created and limited therein in the same manner : 2 Kent, \*353 ; 4 Kent, \*282 ; *Burleigh v. Clough*, 52 N. H. 267, 278 ; *Sampson v. Randall*, 72 Me. 109. In case of a sale of the property, the tenant for life and devisees or legatees in remainder would take the same interests in the proceeds, respectively, as they had in the property. The income would go to the widow, and the principal at her death to the children : *Ackerman v. Gorton*, *supra*.

The general rule applicable to the construction of wills is that the intention of the testator, as collected from the whole instrument, is to govern, provided it be not inconsistent with the rules of law. The purpose of the testator in this case was that his property should be used and preserved for the exclusive benefit of his family. Any construction which would permit any part of the estate to be diverted, for the benefit of strangers to his blood or affections, is inadmissible unless necessarily resulting from the terms of the will. To effect this purpose, the general scheme of testamentary disposition appears to have been to give his surviving wife a life estate in all his property, real and personal, with the right to enjoy the use and possession thereof, and to make a future provision for the children through an equal distribution thereof among them at her death, with a superadded provision for the support and education of the children.

1. The express provision or limitation of a life estate, with remainder over, so plainly defines the nature of the estate and interest intended to be given to the widow that the subsequent clauses cannot be construed as enlarging it into a fee, though the language used therein may create a charge or power of disposition in certain contingencies upon or over the capital fund. The general rule is stated by Chancellor KENT as fol-

lows: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee :" 4 Kent, \*535. "Words of implication do not merge or destroy an express life estate, unless it becomes absolutely necessary to uphold some manifest general intent :" Ib. \*319 ; Burleigh *v.* Clough, 52 N. H. 267, 277. This was the common-law rule, under which a devise to one generally, without words of inheritance, or otherwise indicating an intention to grant a greater interest, passed an estate for life only. An estate thus given generally, with a power of disposition, by implication carried the fee. But then, and now since the statute, an intention to convey a less estate, expressed or clearly implied, will control : 4 Kent, \*537 ; Gen. St. 1878, c. 47, § 2 ; Jackson *v.* Robins, 16 John. 537, 558, 559 ; Johnson *v.* Battelle, 125 Mass. 453 ; Stuart *v.* Walker, 72 Me. 145.

The contention that in this case the widow took any greater interest or estate than that of a tenant for life cannot be supported ; that is to say, the authority to use or dispose of any part of the property or principal, implied from the language of the will or the charge therein imposed for the support of the children, is the grant of a power and not of property : Herring *v.* Barrow, L. R. 13 Ch. Div. 144.

2. In the clause embracing the gift of the remainder to the children on the death of the wife, we find the words, "and which, or any part of the estate and property then left by her, shall be divided among my children." This clearly implies a power to use some part of the principal or capital, if it should be found necessary, for the support of the widow and the maintenance and education of the children, so long as provision for such purpose should be reasonably necessary. This construction is warranted from the language in furtherance of the general purpose of the testator in making provision for his family. The use of such words in a devise after the limita-

tion of a life estate has given rise to a considerable discussion in the Courts, which seem more or less divided in opinion as to the effect to be given them. In *Blanchard v. Blanchard*, 1 Allen, 223, the Court thought that the words "that may be left at the death" of the life tenant added nothing, and meant simply the property left after the life estate had terminated; while the same Court, in *Paine v. Barnes*, 100 Mass. 470, concede that under the authorities the words "if anything should remain," in a like case, implied a power of disposition by the life tenant. So, in *Johnson v. Battelle*, 125 Mass. 453, the words "whatever of said estate remains unexpended" implied a similar power of disposition, if it appeared necessary for the support of the life tenant. In *Green v. Hewitt*, 97 Ill. 113, 117, the words "whatever remains" were referred to the anticipated condition of personal property when turned over to the remainderman, some part of which would necessarily be worn out, lost, or consumed in the natural course of things during the tenancy of the first taker.

The construction in each case will, of course, turn largely upon the peculiar language used and its connection. Thus, in *Martin v. Eaton*, 57 N. H. 154, the words "remaining property," used after provisions for payment of debts and erection of grave-stones, gave no additional authority to the life tenant. The construction in *Green v. Hewitt* was doubtless too narrow, because, with the exception of items of perishable property, which it might, perhaps, be the duty of the life tenant to sell, convert into money, and invest, the grant of such personal property as might wear out and perish in the using during such tenancy would necessarily imply the right to so wear it out or consume it: *Martin v. Eaton, supra*. In some cases, also, good management would require that certain kinds of personal property, as stock or utensils on a farm, should be disposed of and replaced, the property substituted following the course of the original bequest: *Groves v. Wright*, 2 Kay & J. 347, 351, 352; 1 Schouler, Pers. Prop., § 140.

But in *Henderson v. Blackburn*, 104 Ill. 227, 232, it was held that the words "if there is anything left" implied a power of

disposal of the entire estate, or such part of it as might be necessary for the use of the life tenant. A similar conclusion was reached in *Clark v. Middlesworth*, 82 Ind. 240, 246, where the testator devised all his property, real and personal, to his wife during her life, "and at her death, should anything remain, the same to be divided among my heirs-at-law." So in *Brandow v. Brandow*, 66 N. Y. 401, on the death of the life tenant it was provided that all the estate, real or personal, which might "*be found then*" should be equally divided among the testator's children. There the property was given to the widow for life, and she was charged with the duty of caring for and educating the children. She was held entitled to use the *corpus* of the property, if necessary, for the support and education of the minor children. In this case the language, "and which or any part of the same then left by her," is sufficient to indicate an intention on the part of the testator to grant the right to use some portion of the *corpus* of the estate, upon the condition that it should be found necessary in order to give effect to the intention of the testator.

3. In respect to the provision for the support and education of the children by the life tenant, it is to be construed in connection with the clauses of the will which we have just been considering. Though the word "condition" is used, it is clear that the obligation on her part to provide for their support and education is a continuing one, at least as long as it should be reasonably necessary. If she consents to take under the will, she is bound by its provisions; and she is required to make such provision "out and from said property left her," in consideration of the gift and devise made to her. She is therefore to use the property for their benefit as well as her own. The property is charged in her hands as tenant for life; and as a devise of the use of property for life is a devise of the property for such term: *Farmers' Bank v. Moran*, 30 Minn. 165; so a charge upon the property so devised is a charge upon the rents, income, and profits issuing therefrom to which the life tenant is entitled. And, besides, the charge, though fastened upon the property in her hands, is also a personal

burden upon her. She is required to discharge this duty, and is responsible for it out of the devise or gift made to her: 4 Kent, \*540, note c; *Gardner v. Gardner*, 3 Mason, 178, 208; *Taft v. Morse*, 4 Met. 523. If the property remained unsold—as an improved farm, with stock and utensils, for instance, occupied by the family—the rents and products thereof, if sufficient for the support of all, should be so applied, and their support would thus be provided out of the property.

We think this construction best accords with the purpose of the testator as manifested by the several clauses of the will read together. That is to say, the income is to be applied to the support of the widow and maintenance and education of the children; and in case the same should prove insufficient, so much of the capital fund may be so used as shall be reasonably necessary therefor. She is not to use the principal while the income is sufficient. This intention would appear more clearly, perhaps, if the clause providing for the support of the children had immediately followed the devise to the wife; but it makes no difference in the construction of the will. The power to sell and convert the property is conferred on the executors, and not on the widow. This is not inconsistent with her right to appropriate such portion of the capital fund as may be proper. The clause granting this power to the executors operates as a restraint upon the power of disposition by the widow, but the several clauses must be construed together and in subordination to the purpose of the testator as manifested by the entire instrument, and the power given to the executors must be exercised so as to secure to her the benefit and enjoyment of the estate as provided by the will.

4. In such cases it is not the practice to require of the life tenant a bond as a condition of the delivery of the property, nor of its retention, unless there is danger of its being wasted, secreted, or removed. But an inventory should be filed, as was directed in this case, and the life tenant, upon a proper showing of real danger, may be called to account and required to give bonds. And doubtless her executors would be liable to account from her estate for any destruction or loss of the

principal caused by an abuse of her trust: 2 Kent, \*354; 1 Schouler, Pers. Prop., § 152; Sampson *v.* Randall, 72 Me. 109; Burleigh *v.* Clough, 52 N. H. 267, 283; De Peyster *v.* Clendinning, 8 Paige, 295; Jones *v.* Simmons, 7 Ired. Eq. 178.

The case is remanded, with directions to modify the judgment in conformity with this opinion, and charging the income of the estate primarily with the support and education of the children.

Sayward *v.* Sayward, 7 Me. 210; Throop *v.* Williams, 5 Conn. 100; Pearce *v.* Savage, 45 Me. 90; Moore *v.* Littel, 41 N. Y. 66; Leslie *v.* Marshall, 31 Barb. 560; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475; Boraston's Case, 3 Coke Rep. 20.

### *Contingent Remainders.*

Contingent remainders are of two kinds: (1) Those limited to take effect either to a dubious or uncertain person, or (2) upon a dubious or uncertain event.

#### *Uncertain Person.*

##### HUNT *v.* HALL.

Supreme Judicial Court of Maine, 1853.

37 Me. 363.

One having only a contingent interest in lands brings an action of waste against the defendant, who is acting under permission from the life tenant.

APPLETON, J. This is an action of the case in the nature of waste, and it is brought under the provisions of R. S. c. 129, §§ 4 and 5.

Ephraim Hunt, under whom the plaintiffs derive title, by his last will gave a life estate in the premises in which waste is alleged to have been committed, to his wife, and after her decease, directed that equal division should be made among all his children, and the heirs of such as might then be deceased, of all his property, both real and personal. The tenant for life is still living, and the defendant represents her estate.

The rights of the parties depend upon the nature of the estate, which was devised by the will of Ephraim Hunt, which was in the words following:—"After the decease of my dear wife, my will is that my executor, hereafter named, cause an equal division to be made among *all my children and the heirs of such as may then be deceased.*" The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided "among his children and the heirs of such as may then be deceased." By the terms of the will, the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate.

"Contingent or executory remainders (whereby no present interest passes) are when the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious or uncertain event; so that the particular estate may chance to be determined and the remainder never take effect:" 2 Bl. Com. 169. In *Olney v. Hull*, 21 Pick. 311, the words of the devise were almost identical with those in the case now under consideration, and the Court held that until the death of the widow, it was uncertain, who would then be alive to take, and that therefore no estate vested in any one before that event happened. Where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive: 2 Cruise's Dig. Title 16, Remainder, c. 1, § 21. So where one devised lands to his daughter H. and her

husband, for their respective lives, and after their death to the heirs of H., it was held that the remainder was contingent until the death of H., and then vested in the persons who were then heirs: *Richardson v. Wheatland*, 7 Met. 169; *Sisson v. Seabury*, 1 Sum. 235.

It is obvious that by the terms of the will, the plaintiffs took a contingent and not a vested remainder. They are not within the provisions of R. S., c. 129, and consequently are not entitled to maintain this action.

Exceptions overruled. Non-suit confirmed.

To the same point.

**OLNEY v. HULL.**

Supreme Judicial Court of Massachusetts, 1838.

21 Pick. 311.

The clause in the will on whose construction the rights of the parties depended was as follows: "I give to my dear and loving wife, as long as she remains my widow, the improvement of all my lands and buildings. . . . Should my wife marry or die, the land then shall be equally divided among my surviving sons, with each son paying \$60 to my daughters, to be equal divided among them, as soon as each son may come in possession of said land."

MORTON, J. The demandants, in right of the wife, claim an undivided portion of a certain farm in this county. The tenant claims the whole. These respective claims and titles will be examined, as far as may be necessary to the decision of the case. The farm in controversy was once the undisputed estate of Simeon Jones. In 1809 he made his will, which afterward was duly approved and allowed. Upon the *true construction* of that will must depend the rights of these parties.

Simeon Jones left *nine* children, *six* sons and *three* daughters. *Five* of the six sons died before their mother. One of the sons is now alive, under whom the tenant claims. The demandant's wife is one of two heirs of one of the sons who died before his mother. These facts raise the question whether this

will gave to the sons a *vested* or a *contingent* remainder. If the former, then the demandant's wife will be entitled to a moiety of the share which vested in her father before his death. If it was only a contingent remainder, to take effect on the death of the mother, then as the son died first nothing vested in him, and, of course, nothing descended to his heirs.

Fortunately it will not be necessary to enter very deeply into the discussion of the intricate and uninteresting doctrine of remainders. It is enough in the outset to state and carry with us into the investigation the well-established principle, that the law has no partiality for *contingent* remainders, but, in all cases of doubtful construction, leans toward *vested* remainders: *Dingley v. Dingley*, 5 Mass. R. 537. However, the intention of the testator is always to be the polar star to guide our inquiries. Whenever the meaning can be ascertained, it must govern, whether it result in *contingent* or *vested* remainders.

In this will it is perfectly clear that the testator intended to give to his wife the improvement of his farm during her life or widowhood. And having carved out this estate for her, he gave the remainder to his surviving sons, to be equally divided between them. Had he given generally to his sons, all who happened to be alive at his decease, viz., all who survived him, would have taken. This construction the demandants contended for. But if "*surviving sons*" meant those who outlived the mother, then, as one only survived her, he took the whole estate, which the tenant now holds under him. Perhaps the reason of the preference which the law gives to *vested* over *contingent* remainders could not be better illustrated than in this case. As several of the sons had families and left children, justice would seem to require that these grandchildren should partake of their ancestor's bounty, rather than the whole should go to one child in exclusion of all the other children and grandchildren. This certainly is a strong reason to influence the mind of the testator to induce him to give *vested* rather than *contingent* remainders. And it may lawfully

and properly influence our minds in cases of doubtful construction ; because we should suppose it more probable that the testator intended the one than the other. But it can never authorize us to make a will for him. He says : "Should my wife marry or die, the land *then* shall be equally divided among my surviving sons." The time when the estate was to be divided among the sons is certain and definite. It was when the intermediate estate terminated by the death or marriage of the tenant. Among whom was it to be divided ? Not those who survived any prior event, not those who survived the father ; but those who survived that particular event, those surviving the death or marriage of the widow.

Had the testator intended to give to the sons who were alive at his own death, he would have said : " My sons who survive me, or whom I may leave, or who shall be alive at my decease." Or, if he had given to his sons generally, the effect would have been the same. It would be more plausible to suppose that he meant all the sons surviving the making of the will ; but this would be an unnatural construction.

The provision, that each son should pay the daughters sixty dollars on coming into possession, cannot have much tendency to show that he intended to give a vested remainder. No doubt he expected that the sons would survive the mother, at least, more than one of them, and that the daughters would receive a much larger sum than sixty dollars. But it cannot be inferred that he intended the heirs of deceased sons should take portions ; because if he had it must be presumed that he would have required the sons' heirs, as well as the sons themselves, to pay the sixty dollars to the daughters.

The construction of wills and other instruments depends so much upon the peculiar expressions used in each that not much aid can be derived from adjudged cases. Yet in the case of *Hurlburt v. Emerson*, 16 Mass. R. 241, the language used is so similar to this that it may well be referred to as being in point.

On the whole, we are clearly of opinion that the fair, and only fair construction of the language in the will gives the

estate to such sons as should survive the mother; that until her death it was uncertain who would be alive to take, and therefore, that no estate vested in any one before that event happened; and that, as one only survived her, the whole estate, on her death, vested in him. As nothing vested in the father of the defendant's wife, nothing descended to her; and so this action cannot be maintained. We have not thought it necessary or expedient to inquire into the tenant's title, or to examine any of the questions growing out of the several levies of executions introduced into the case.

Demandants non-suit.

Hitchcock *v.* Simpkins, 58 N. W. 47; Rutland *v.* Chessen, 98 Ala. 435; 13 So. Rep. 606; Armstrong *v.* Armstrong, 54 Minn. 248; Smith *v.* Rice, 130 Mass. 441; Bamforth *v.* Banforth, 123 Mass. 280; De Lassus *v.* Gatewood, 71 Mo. 371; Chapin *v.* Crow, 147 Ill. 219; 35 N. E. 536.

An estate in remainder vested in one's children will open to let in other children born before the particular estate terminates: Waddell *v.* Waddell, 99 Mo. 338; 12 S. W. 349.

### *Uncertain Event.*

MORSE *v.* PROPER.

Supreme Court of Georgia, 1889.

82 Ga. 13; 8 S. E. 625.

SIMMONS, J. On the 12th of January, 1855, L. S. Morse executed a deed conveying certain real and personal property to his step-mother, Mrs. Anna Morse, for and during her natural life; the *habendum* and *tenendum* clause of the deed being as follows:

"The said Anna Morse to have and to hold said house and lot and said negroes and their increase, during her natural life, for her sole and separate use and benefit, free from the debts and liabilities of her husband, the said Oliver Morse, either heretofore made or hereafter contracted; and after the death of the said Anna Morse, I give said property, real and personal, and its increase, to such of the children of the said Anna Morse by her present husband as may be living at her death, and the representatives of such as may be dead, in fee, the representative to take the share their

deceased parent would have been entitled to, had he or she been alive; but if the said Anna Morse should die without child or children or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse in fee simple."

The deed appointed Oliver Morse trustee, with power to sell and reinvest for the purposes set forth. Oliver and Anna Morse had, at the time of the execution of this deed, a son, Daniel Morse, who was born on the 1st of January, 1854, and died on the 18th of July, 1868, and at his death was the only child; and none other was born to them. Daniel died without issue and before his father. The trustee sold the property conveyed by the deed, and reinvested the proceeds in real estate, taking deeds thereto in his name as trustee; and at his death he had on hand a certain dwelling-house and a storehouse and fifty acres of land. After the death of Daniel Morse, the child, on the 18th of July, 1868, Oliver Morse, on the 5th of August, 1868, made a will, by which he bequeathed to his wife, Anna Morse, "all and every interest, claim or title, either present or in expectancy, and all my real estate that I own individually, or as trustee for her." Oliver Morse died in a few days after making this will. Anna Morse lived until the 18th of November, 1887, when she died, leaving no child or children or representative of child or children, and leaving a will in which she bequeathed all her property of every character to her sister, Mrs. Sarah Proper, and making Mrs. Proper her executrix. Mrs. Proper undertook to carry out the will and to administer upon the property above described; and L. S. Morse, the grantor in the deed to Mrs. Anna Morse, filed a bill claiming that the property constituted no part of Mrs. Morse's estate, and that his father had no right to transmit the remainder interest to his wife by will or deed; that the remainder interest was "gone forever," and the property reverted to him, the original grantor; and that Anna Morse had no right to convey said property in her will to her sister, Mrs. Proper. He prayed an injunction restraining Mrs. Proper, the executrix, from interfering with his rights touching the property, and from exercising control

or management over it, and prayed for the appointment of a receiver, etc.

The defendant answered the bill, and claimed the absolute title to the property in dispute under her sister's will. She insisted in her answer that Oliver Morse had such an interest as he could dispose of by will, and that he devised it to his wife, Anna, and that Anna devised it to her, and that her title to and ownership of the property were absolute. The Chancellor refused the injunction prayed for by L. S. Morse, and the complainant excepted.

The question for decision in this case is, whether Oliver Morse had such an interest in this property at the time of his death, in 1868, as he could transmit by will to his wife. If he did have such a devisable interest, having devised it to his wife, and his wife having devised it to her sister (the defendant in error here), the Chancellor was right in refusing the injunction. It will be remembered that the deed from L. S. Morse to Anna Morse gave her this property for and during her natural life, and after her death it was to go to her children or the representatives of the children; and in case she died, leaving no children or representatives of children, the property was to go to Oliver Morse in fee. In our opinion, Oliver Morse, under this deed, took a remainder interest in this property. Was it a vested or a contingent remainder? The plaintiff in error contended that it was a contingent remainder, and that the contingency was as to the person, and therefore Oliver Morse, under § 2266 of the code, had no such interest in the property as he could devise to his wife. Counsel for the defendant in error contended (1) that Oliver took a vested remainder under the deed made in 1855, but that if it was a contingent remainder, the contingency was as to the happening of an event, and not as to the person, and therefore he had no right to devise it. This case was ably argued by counsel on both sides, and we have given it a great deal of consideration, and we think that Oliver Morse had such an interest in this property as he could devise to his wife, and therefore the Chancellor was

right in refusing the injunction. We think that under the deed he took a contingent remainder, and the contingency was as to the event, and not as to the person. The language of the code on this subject is as follows, § 2265 : "Remainders are either vested or contingent. A vested remainder is one limited to a certain person at a certain time, or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person, or upon an event which may or may not happen." Section 2266 : "If the remainderman dies before the time arrives for possessing his estate in remainder his heirs are entitled to a vested remainder interest, and to a contingent remainder interest when the contingency is not as to the person, but as to the event." The deed in this case declares that "if the said Anna Morse should die without child or children or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse in fee simple." We think the contingency depended on the event of Anna Morse dying without children or the representative of children. The deed means, in our opinion, that in that event, or in that case, or when that particular thing should happen, Oliver Morse should take the property in fee. There was no uncertainty as to who should take if there were no children or representative of children living at the time of her death. The person to take in that event was certain, and was fixed by deed. In case there were no children or representative of children living at the time of Anna's death, the deed points unerringly to the person who would take, and declares that he should take in fee simple, which, under our law, means not only himself, but his heirs and assigns. If the deed had said that in case Mrs. Morse died without children or representative of children, then to the heirs or right heirs of Oliver Morse, the person to take in that event would have been uncertain; or if it had said, in case of Mrs. Morse dying without children or representative of children, to the heirs of John Smith, the persons to take would have been uncertain; but, as we have said before, the deed does not leave it uncertain who is to take in the event she died.

without children or representative of children. It seems that in that case Oliver Morse is to take in fee simple. Oliver Morse having a contingent remainder interest in this property, did he have a right to dispose of it by will to his wife? We think he did. The old doctrine was, that contingent remainders were not devisable by the person entitled thereto; but that doctrine was abandoned many years ago, and it is now held almost universally that a contingent remainder is devisable where the contingency is not as to the person, but as to the event. Indeed, that is the principle announced in our code, § 2266. That section declares that if the remainderman dies before the time arrives for possessing his estate his heirs are entitled to a contingent interest, when the contingency is not as to the person, but as to the event. If the contingency be as to the person, and that person be not *in esse* at the time when the contingency happens, his heirs are not entitled. It is contended by counsel for the plaintiff in error that the latter part of this section controls the case; but we think we have shown that the contingency was not as to the person, but as to the event, and, therefore, the latter part of the section does not apply to this case.

Counsel for the defendant in error cited the case of *Loring v. Arnold*, 8 Atlantic Rep. 335 (Supreme Court of Rhode Island), the facts of which case, we think, are exactly the same as in the case now under consideration. In that case, it appears that Thomas Whipple died in 1843, leaving a will by which he devised certain real estate to his son James, "for and during his natural life, and at his decease, if he should leave any lawful child or children, then to them, their heirs and assigns forever; but if he should die without leaving any lawful child or children, then my will is that the same shall descend and be divided equally among his brother T., his sisters G., M., S., A., and J. A. B., to them, their heirs and assigns forever." J. A. B. died in Illinois in 1881, leaving by will all her estate in Rhode Island to C. E. B. James died in 1885, leaving no wife or children. It was held that J. A. B. had a contingent remainder, and that although this contin-

gency was not determined until after the death of J. A. B., yet the person who was to take being certain, the interest was descendible and devisable. So also in 2 Leading Cases in the American Law of Real Property, 374; Buzby's Appeal, 61 Pa. 111; Chess's Appeal, 87 Pa. 362; Fearne on Rem., 7th ed. 364-5; 4 Kent, 264; 2 Washb. Real Prop. 522.

The case of *Jackson v. Waldron*, 13 Wendell, 178, relied on so strongly by the plaintiff in error, was overruled in the case of *Miller et ux. v. Emmons et al.*, 19 N. Y. 384. The decision in the case of *Morehouse v. Wainhouse*, decided in 1767 and reported in 1 Blackstone's Reports, also relied on by the plaintiff in error, was put upon the peculiar circumstances of that case, and the facts of that case are different from the facts in this.

Judgment affirmed.

*Loring v. Arnold*, 15 R. I. 428; 8 Atl. R. 335.

The same kind of an interest may be created in a trust fund: *Cummings v. Stearns*, 161 Mass. 506.

C

**The Rule in Shelley's Case.**

**HARDAGE v. STROOPE.**

Supreme Court of Arkansas, 1893.

58 Ark. 303; 24 S. W. 490.

BATTLE, J. J. L. Stroope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stroope

and wife, but they died in her lifetime. She died leaving no heirs of her body, but left her father, W. S. Stroope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stroope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs. Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." Appellee contends that Mrs. Carroll only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in Shelley's Case, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grandchildren. They were not the children, as they died in the lifetime of their mother.

The effect of the deed, as explained by the *habendum*, in the absence of the rule in Shelley's Case, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and, in default thereof, to her collateral heirs. As there can

be collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1) Does the rule in Shelley's Case obtain in this State? (2) And, if so, does the deed in question fall within it?

1. Is it in force in this State?

Section 566 of Mansfield's Digest provides: "The common law of England, so far as the same is applicable and of a general nature and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First that are applicable to our own form of government of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this State, shall be the rule of decision in this State unless altered or repealed by the General Assembly of this State."

The rule in Shelley's Case, as stated by Mr. Preston, which Chancellor KENT says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." Its origin is enveloped in the mists of antiquity. It was laid down in Shelley's Case in the twenty-third year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year books. Sir WILLIAM BLACKSTONE, in his opinion in *Perrin v. Blake*, 1 W. Bl. 672, cites a case in 18 Edw. II as establishing the same rule. The earliest intelligible case on the subject, however, is that of Provost of Beverly, 3 Y. B. 9, which arose in the reign of Edward III, and substantially declared the rule as laid down in Shelley's Case.

Various reasons have been assigned for the origin of the

rule. Chancellor KENT, upon this subject, says: "The Judges in *Perrin v. Blake*, *supra*, imputed the origin of it to principles and policy deduced from feudal tenure, and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage, and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner, and to the same extent, precisely, as if they took by hereditary succession. The policy of the law will not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice BLACKSTONE, in his argument in the Exchequer Chamber in *Perrin v. Blake*, does not admit that the rule took its rise merely from feudal principles, and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth, and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his observations concerning the rule in Shelley's Case, considers the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal law, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped

of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase—an amphibious species of inheritance—or a freehold with a perpetual succession to heirs, without the other properties of inheritance. In *Doe v. Laming*, 2 Burrows, 1100, Lord MANSFIELD considered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and, if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts."

But, whatever may have been the cause of its origin, its effect has been "to facilitate the alienation" of land "by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and doubtless contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor the locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country, and with the liberal and commercial spirit of the age. Hence, it has been recognized and enforced as a part of the common law of nearly every State where it has not been repealed by statute: *Starnes v. Hill* (N. C.) 16 S. E. 1011; *Baker v. Scott*, 62 Ill. 88; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Doebler's Appeal*, 64 Pa. St. 9; *Kleppner v. Laverty* 70 Pa. St. 72; *Polk v. Faris*, 9 Yerg. 209; *Crockett v. Robinson*, 46 N. H. 454: 4 Kent. Comm. marg. pp. 229-233; 2 Washb. Real Prop. (5th ed.) pp. 655-657.

The rule has never been changed in this State except in one respect—estates tail have been abolished. Section 643 of Mansfield's Digest provides that, whenever any one would

become seized at common law "in fee tail of any lands or tenements by virtue of a devise, gift, grant, or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant, or conveyance." To this extent it has been repealed; in other respects it remains in full force in this State; and it was so held in *Patty v. Goolsby*, 51 Ark. 71, 9 S. W. 846.

2. Does this case come within the rule?

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs . . . (or equivalent expressions) either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs, . . ." according to the rule in Shelley's Case, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united, and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object—the groundwork of the grantor's or testator's bounty"—and upon the presumption, arising from the fact that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs . . . of the ancestor, and be entitled only in respect of such description," and that the estate devised or conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent that the ancestor should take an estate for life only, and the heirs should take by purchase,"

and vests the estate of inheritance in the ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor: 2 Fearne, Rem., pp. 216-220.

"Hargrave has justly observed," says Fearne on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that, when it is once settled that the donor or testator has used words of inheritance according to their legal import—has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus by reference to whom the succession is to be regulated—then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation—a means of accomplishing that intention to comprise, by the use of the word 'heirs' the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated; and the way in which the rule operates as a means of doing this, is by construing the word 'heirs' as a word of limitation, or, in other words, by construing the limitation to the heirs, general or special, as if it were a limitation to the ancestor himself and to his heirs, general or special." 2 Fearne, Rem., p. 221.

In Doebler's Appeal, 64 Pa. St. 9, Judge SHARSWOOD, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take *qua heirs*, they must take by descent, and the inheritance vest in the ancestor. The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and, though the original reason of it—the preservation of the rights of the lord to his relief, primer seisin, wardship, and marriage—has passed away, it is still maintained as a part of the system of real property which is based on feudalism, and as a rule of policy. It declares inexorably that, where the ancestor takes a pre-

ceding freehold by the same instrument, a remainder shall not be limited to the heirs, *qua heirs*, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. This is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply that the ancestor shall be tenant for life only, and impeachable for waste, if he interpose an estate in trustees to support contingent remainders, or, as in this will, declare in so many words that he shall in no wise sell or alienate, as it is intended that he shall have a life interest only, it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor KENT, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers." 4 Kent. Comm. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A. forever," or "to A. and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this State the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in

controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's Case. The estate of inheritance vested in Mrs. Carroll, and she became seized of the land in fee simple: 2 Washb. Real Prop. (5th ed.) p. 653.

"As a consequence from the foregoing principles, whoever has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs." 2 Washb. Real Prop. 651.

It follows then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts, and that a sale of such estate under the deed, and in conformity with law, was valid.

The decree of the Court below is reversed, and the cause is remanded for proceedings consistent with this opinion.

*Smith v. Collins*, 90 Ga. 411; 17 S. E. 1013; *Henderson v. Walthour*, 15 Atl. Rep. 893; *Frank v. Frank*, 17 Atl. Rep. 11; *Van Olinda v. Carpenter*, 127 Ill. 49; 19 N. E. 868; *Hughes v. Nicklas*, 17 Atl. Rep. 398; *Howell v. Knight*, 100 N. C. 254; 6 S. E. 721.

Rule abolished in Minnesota: Gen. Stats. 1878, ch. 45, § 28.

## 2

### REVERSIONS.

**A reversion is an estate in expectancy arising from construction of law, and consists in "the residue of an estate left in the grantor or his heirs, or the heirs of a testator, commencing in possession on the termination of a particular estate granted or devised."**

#### BURDEN *v.* THAYER.

Supreme Judicial Court of Massachusetts, 1841.

3 Met. 76.

**SHAW, C. J.** Upon the case-stated, it appears that in 1833 William Capron, being owner of the estate, leased the same to the defendants for a term of twelve years from April 1, 1833,

at a rent of \$130, payable annually on the 1st of April each year during the term.

On the 5th of April, 1837, said Capron mortgaged the leased premises to the plaintiff, to secure the payment of \$2,250 in one year from date, which has never been paid. In May, 1837, the plaintiff gave notice of this mortgage to the defendants. The defendants have paid to the plaintiff the annual rents due April 1, 1838 and 1839, which accrued after the mortgage to the plaintiff; but they refuse to pay the rent due April 1, 1837, which became due and payable to Capron, the lessor, five days before his mortgage to the plaintiff; and the question is, whether the plaintiff is entitled to recover that year's rent.

The mortgage from Capron to the plaintiff described the premises as under lease to Thayer & Fairbanks for a term of years, and adds: "Should the conditions of the mortgage be broken, the rents, dues, and demands, of every kind arising out of said leased premises, due or becoming due, shall be paid to said Burden, his executor, and all the leases shall be assigned to him, and he is authorized to demand and receive the same in his own name, or that of said William Capron, and proceeds appropriated to the payment of said mortgage."

The Court are of opinion that the plaintiff has no right to recover the year's rent which fell due and was payable, and in arrear, when he took his deed of Capron. When a man takes a deed, either by way of absolute conveyance or mortgage, of an estate which is under a lease for years, he must take such estate as his grantor had; which, in that case, is a reversion—the estate subject to the lease. But the rent is incident to the reversion and passes with it, and the grantee or mortgagee, by force of the conveyance, has a right to receive all rent accruing upon the estate; it is a part of the realty and passes by the deed. But when rent is payable quarterly or yearly, the annual or quarterly payments are not to be apportioned. If the reversion is transferred before the time at which the rent becomes due, the right to such quarter's or year's rent passes with the reversion. In the present case,

had the year's rent become due five days after, instead of five days before, the mortgage to the plaintiff, it would have passed by it to the plaintiff. The rule is well expressed in Cruise's Digest, Tit. 28 c. 1, § 65. The right to a rent service is real estate descendible to the person who is entitled to the reversion. But from the moment that a payment of rent becomes due it will go to the lessor's executor.

Formerly, in order to constitute a privity of estate between the purchaser of the reversion and the lessee, so as to enable the former to maintain an action of debt for rent, attornment was necessary. But by St. 4 Anne, c. 16, § 9, a grant of the reversion is good and effectual without attornment: *Moss v. Gallimore*, 1 Doug. 279. That statute having been passed long before the Revolution and this provision being a rule in amendment of the common law, we may probably consider it in force here: *Commonwealth v. Leach*, 1 Mass. 61. But if otherwise, the rule itself is well established on the authority of long usage, and its adaptation to the more simple tenures which were in use under our former government: *Farley v. Thompson*, 15 Mass. 25, 26.

The general principle that all future accruing rent passes with the reversion is confirmed by the case of *Birch v. Wright*, 1 T. R. 378. These principles apply to all effectual conveyances of the reversion, whether by absolute deed or by mortgage. Then let us apply them to the case of a mortgage of an estate under lease, and with reference to other cases determining the relative rights of mortgagor and mortgagee.

It is now well settled that a mortgage in fee transfers presently all the title which the mortgagor has in the estate; and this includes the right to enter and hold possession of the estate, even though the mortgage is given to secure the payment of a debt at a future day, unless there is some stipulation that, until a breach of the condition, the mortgagor shall hold possession. In such case, the rents and profits of the mortgaged premises constitute a part of the fund pledged for the payment of the principal and interest of the debt to be secured; and must be accounted for by the mortgagee: *Newall v.*

Wright, 3 Mass. 138. But in such case, it is optional with the mortgagee whether he will enter or not; and, in general, if the estate is ample security for the debt and interest, it is not for the interest of the mortgagee to incumber himself with a liability to account; and therefore it commonly happens that in case of a mortgage in fee the mortgagor is left in possession.

But in case the premises at the time of the mortgage are under lease for a term of years, the mortgagee cannot disturb the possession of the lessee, who has a prior title; and therefore he cannot enter. But as the mortgage transfers the reversion, to which the rent is incident; as it binds the whole of the realty, of which the rents afterward accruing are a part; he may give notice of his right to the lessee and of his election to take the rents, and then the lessee becomes bound to pay the rent to him as mortgagee. But if he does not elect to take the rents and account for them, then, in analogy to the right of a mortgagee in fee to enter or not, at his election, the mortgagee of a reversion may forbear to give notice to the lessee; and in that case the lessee will be protected in paying the rent to the mortgagor. And so it seems to be provided by the statute of Anne before cited, that no tenant shall be prejudiced by the payment of rent to his landlord until he has notice of the transfer of the reversion. This, it is strongly intimated by Mr. Justice BULLER, in the case of *Birch v. Wright*, 1 T. R. 385, would have been the rule of the common law, if no such proviso had been expressed in the statute.

But it seems to be extremely well settled by the cases that the rent, which became due and was in arrear at the time of the assignment of the reversion, whether absolutely or by way of mortgage, was a part of the personalty due to him who had the reversion when it accrued, and did not pass to the grantee or mortgagee of the reversion: *Moss v. Gallimore*, 1 Doug. 279; *Birch v. Wright*, 1 T. R. 378; *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 268; *Demarest v. Willard*, 8 Cow. 206. To apply these rules to the present case, it results that at the time the rent now in question fell due, April 1, 1837,

William Capron was the holder of the reversion in his own right, and by force of the lease was entitled to the rent. It then became a debt to him, a chose in action, and did not pass by the mortgage to the plaintiff. But as the plaintiff did give notice to the tenant, in May, which was before another year's rent became due, he acquired a right to the rent which accrued April 1, 1838, although it was before condition broken. This, however, is stated on the assumption that there was no stipulation in the mortgage that the mortgagor should retain possession until condition broken. This is not stated in terms, but we take it for granted, though not now material to this case, because that year's rent has been paid into Court by the defendant.

But another ground is taken in argument, arising out of the special terms of the mortgage, as above cited. It is contended that, by force of that special clause, Capron assigned to the plaintiff rents, dues, and demands arising out of said leased premises, due or becoming due, etc. It may well be doubted whether this did not look to the contingency of the condition being broken by the non-payment of the debt, and means to transfer to the mortgagee such sums as should be then due. But the decisive answer is that this, if available at all, was nothing more than the assignment of a chose in action. The year's rent then due and in arrear was a debt, and though it arose out of the land, yet had become wholly detached from it. All the above authorities, which go to show that it had ceased to be part of the realty and that it did not pass by the conveyance of the land, establish the point that it was a mere chose in action. Being so, it cannot be recovered by the plaintiff in his own name, whatever equitable right he may have to claim it in the name of the assignee. See *Willard v. Tillman*, 2 Hill's (N. Y.) Rep. 274.

According to the terms of the report, the order must be that a new trial be granted; but as this opinion is decisive of the plaintiff's case, the proper course will be, if the plaintiff consent, to enter a non-suit.

The usual incidents of reversion at common law were fealty and rent: 2 Bl. Com. 176; *Condit v. Neighbor*, 13 N. J. L. 83.

**EXECUTORY DEVISE.**

An executory devise is such a limitation of the future estate or interest in land as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.

PROPRIETORS OF THE CHURCH IN BRATTLE SQUARE v. GRANT  
*et al.*

Supreme Judicial Court of Massachusetts, 1855.

3 Gray, 142.

A house and land were devised to the deacons of a church and their successors forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew J. H. and to his heirs forever."

BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this Court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that if a sale was authorized the proceeds might be invested in other real

estate, to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the Court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs-at-law to the estate in controversy. In order to decide the questions thus raised it is material to ascertain in the outset the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle Street. If the gift had been solely to the deacons of the church in Brattle Street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate : Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift ; how far it qualifies the fee devised to the deacons and their successors ; and what was the interest or estate devised over to John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions if

we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or devisor, and his heirs. Upon a breach of the condition the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the devisor, who alone had the right to take advantage of a breach : 2 Bl. Com. 156 ; 4 Kent Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation ; of a condition, because it defeats the estate previously limited ; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno statu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference therefore between an estate in fee on condition and on a conditional limitation is briefly this, that the former leaves in the grantor a vested right which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is

not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory and depending on a condition, or an event which may never happen passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over on the happening of the prescribed contingency to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder as well as gifts and grants which, when made by will, are termed executory devises, and when contained in conveyances to uses assume the name of springing or shifting uses: 1 Preston on Estates, §§ 40, 41, 93; 4 Kent Com. (6th ed.) 128, note; 2 Fearne Cont. Rem. (10th ed.) 50; 1 Pow. Dev. 192 and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear upon

familiar and well-established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it. Thus a devise to A. for twenty years, remainder to B. in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs till C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is that where the event which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate: 1 Jarman on Wills, 780; 4 Kent Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate: 4 Kent Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which

is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason the rule of the common law was established that a remainder could not be limited after a fee. In the present case the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a *quasi* corporation, empowered to take and hold grants in fee, it vested in them, *ex termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for a preceding estate in fee simple is an executory devise: 4 Kent Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise Dig. tit. 38, c. 17, §§ 1, 2; Purefoy *v.* Rogers, 2 Saund. 388 a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an executory devise, because it is a

limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a devisor disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise: 4 Kent Com. 368; 6 Cruise Dig. tit. 38, c. 17, § 2; Bac. Ab. Devise, I; 1 Fearne Cont. Rem. 399.

In the case at bar the devise is to the deacons and their successors in this office forever. By itself this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well-established and salutary rule against perpe-

tuties. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise: 4 Kent Com. 266; 2 Saund. 388 a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this Commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote and tending to create perpetuities: 4 Kent Com. 267; 1 Jarman on Wills, 221; 4 Cruise Dig. tit. 32, c. 24, § 18; Nightingale *v.* Burrell, 15 Pick. 111; see, also, Cadell *v.* Palmer, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect: Nightingale *v.* Burrell, 15 Pick. 111; 4 Kent Com. 283; 6 Cruise Dig. tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2d ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior

estate was to determine, and the gift over take effect, might or might not occur within the life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A., who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendable: *Bacon v. Proctor*, Turn. & Russ. 31; *Mackworth v. Hinxman*, 2 Keen, 658, or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description: *Ker v. Lord Dungannon*, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator de-

vised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes ; and provided that in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick ; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity ; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits : Commissioners of Charitable Donations *v.* Baroness De Clifford, 1 Dru. & War. 245, 253. In this case Lord Chancellor SUGDEN says : "This is a clear equitable devise of a fee qualified or limited ; a fee in the surplus rents for his family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must here read the words 'in case' as if they were 'whilst,' or 'so long as'), certain persons protect the almshouse, etc. ; and thus the limitation would assume the same character as that which is so familiar to us all, viz. : while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate ; a limitation after it is void, and cannot be supported ; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time after-

ward. It can make no difference in the application of the case cited that it was the gift of an equitable fee simple, because the limits prescribed to the creation of future estates and interest are the same at law and in equity: Lewis on Perp. 169; 4 Cruise Dig. tit. 32, c. 24, § 1; Duke of Norfolk *v.* Howard, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 97. It was there held that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever.

Upon this point we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any devesting gift. The general principle applicable to such cases is that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl. Com. 156; 4 Kent Com. 130; Co. Lit. 206 a, 206 b, 223 a. The reason on which this rule is said to rest is that when a party has granted or devised an estate he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been often held that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited that it cannot take effect as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee: Tilbury *v.* Barbut, 3 Atk. 617; Tyte *v.* Willis, Cas. temp. Talb. 1; 1 Fearne Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute: Nottingham *v.* Jennings, 1 P. W. 25; 1 Pow. Dev. 178, 179; 2 Saund. 388 a, b; 1 Fearne Cont. Rem. 467; Attorney General *v.* Gill, 2 P. W.

369 ; Busby *v.* Salter, 2 Preston's Abstracts, 164 ; Kampf *v.* Jones, 2 Keen, 756 ; Ring *v.* Hardwick, 2 Beav. 352 ; Miller *v.* Macomb, 26 Wend. 229 ; Ferris *v.* Gibson, 4 Edw. Ch. 707 ; Tator *v.* Tator, 4 Barb. 431 ; Conklin *v.* Conklin, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were engrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterward relaxed in cases of devises, for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee simple absolute would have vested in the first taker : 6 Cruise Dig. tit. 38, c. 12, § 20 ; Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple ; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless : Shep. Touch. (Preston's ed.) 417. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs

male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate vested in the eldest son of A. as heir male, discharged of the gift over: *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1. So in the case at bar the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void;" "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases: *Shep. Touch.* 129, 133. See, also, 4 H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate of John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law: 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection that the claim set up by the heirs-at-law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this

estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs-at-law, whom she so carefully disinherited. The Court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause: 2 Pow. Dev. 102-104; *Hayden v. Stoughton*, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remain in the donor or devisor, which would pass under a residuary clause, or in case of intestacy, to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is, therefore, no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed conditions be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation.

The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strictly speaking, a limitation: 2 Cruise Dig. tit. 16, c. 2, § 30; Shep. Touch. 117, 126; Vent. 202; Carter, 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent, which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance and constituting together an entire title or

estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Pick. 306, the Court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the defendant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs-at-law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the devesting limitation.

A decree may, therefore be entered for the sale of the estate as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

**RIGHTS NOT AMOUNTING TO AN ESTATE IN LAND.****Possibility of Reverter.**

Where one grants a determinable fee, though he has a right to defeat the estate so granted on the happening of the contingency, he has no estate in the fee, but simply what is termed a "possibility of reverter."

NICOLL v. THE NEW YORK & ERIE R. R. Co.

Court of Appeals, New York, 1854.

12 N. Y. 121.

**PARKER, J.** The grant from Dederer to the Hudson & Delaware Railroad Company, bearing date the 1st day of July, 1836, was made to that company "and their successors." Under that grant there can be no doubt the Hudson & Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute: 2 Kent, 281; Co. Litt. 44 *a*, 300 *b*; 1 Kyd on Corp., 76, 78, 108, 115; 3 Pick. 239. And in this case the power was expressly conferred by the 9th section of the charter (Sess. Laws of 1835, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing, and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant: 1 R. S. 748, § 1.

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years (Laws of 1835, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal. Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute: 1 R. S. 748, § 1. The change made by the statute favors the grantee, where there are no express terms in the grant, by presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms, defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual, without such words, conveyed only a life estate. For the same reason a grant, without such words, to a corporation aggregate (Viner's Ab., Estate, L. 3), or to a mayor or commonalty (Ib. 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and, in their

absence, we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant: 1 R. S. 748, § 1.

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law, that "no implication shall be allowed against an express estate limited by express words." Viner's Ab., Implication, A. 5; 1 Salk. 236.

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient: 5 Denio, 389; 2 Preston on Estates, 50. Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter:" 2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509. Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson & Delaware Railroad Company then, by their grant from Dederer, took a title in fee, but it was a fee

upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition. This is apparent from the language employed in the grant and from the character of the transaction. There are no technical words by which to distinguish between conditions precedent and subsequent. Whether a condition be one or the other is matter of construction, and depends upon the intention of the party creating the estate: 4 Kent, 124; 1 Term R. 645; 2 Bos. & Pull. 295; 3 Peters' U. S. R. 346. In the latter case, MARSHALL, C. J., said: "If the act (on which the estate depends) does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument, the condition is subsequent." In this case it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road, otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition, it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in presenti*, and liable to be divested by the grantee's failure to perform the condition. See, also, 5 Ham. Ohio Rep. 389; 9 East R. 170; 5 Pick. R. 528; 18 Martin's Louis. R. 221; Co. Litt. 246, b. Kent says (4 Kent, 129): "Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates." They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them: 4 Kent Com. 122, 127; 2 Black. Com. 154. The plaintiff took his deed of the farm on the 1st of April, 1844. This was one year before the expiration of the time for constructing the

road and two years before the Hudson & Delaware Railroad Company conveyed to the defendants. At that time, therefore, there had been no breach of the condition; on the contrary, the right of the company was expressly recognized and reserved in the deed. Certainly, then, Dederer, when he conveyed, had no assignable interest.

A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. To that extent the law was changed in England by 32 Henry VIII, c. 34; and similar enactments have been made in several of the States. In this State, these provisions will be found at 1 R. S. 748, §§ 23, 24, and 25, and are limited to grants or leases in fee reserving rents, and to leases for lives and for years. As to other grants upon condition, the common law is unchanged: 2 Kent, 123.

There was a reason for the statutory change in the particular cases mentioned, for in them the grantor had an interest independent of the possibility of reverter. In the cases of a grant or lease in fee, though the grantor has no reversion, he has an interest by way of annual rents reserved, and in the cases of leases for lives and years, he has an actual reversion of what remains after the expiration of the particular estates. In these cases, therefore, he has a vested interest, and may well be permitted to assign with it, and his assignee to take with such interest, his right of entry for non-performance of a condition subsequent; for the right to enforce a forfeiture is necessary to the collection of the rents and to the protection and enjoyment of the reversion. But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the

grantor. There is simply a *possibility of reverter*, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said such possibilities were assignable in equity, but those were interests of a very different character, as I will presently show. So far from including these, Kent says (4 Kent's Com. 130): "A Court of Equity will never lend its aid to divest an estate for the breach of a condition subsequent," and the Chancellor acted upon that rule in *Livingston v. Stickles* (8 Paige, 398).

All contingent and executory interests were assignable in equity, and would be enforced if made for a valuable consideration: 4 Kent, 289. But these words had an ascertained legal signification, and it was never claimed that they were applicable to a case like that under consideration. It will hardly be pretended that Dederer's possibility of reverter was a contingent or an executory interest, in the legal sense of these words.

By the Revised Statutes (1 R. S. 725, § 35) expectant estates are descendible, devisable, and alienable, in the same manner as estates in possession, and it is claimed that Dederer had an expectant estate. But we are relieved from all doubt on this point, by the fact that the statute itself had furnished the definition of the term "expectant estates." They are described (1 R. S. 723, § 9) as including future estates and reversions, and these expressions are also defined in §§ 10 and 12. A future estate is one limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. And by § 13 a future estate is said to be *vested*, where there are persons in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; and "*contingent*," whilst the person to whom or the event upon which they are limited to take effect remains uncertain. A reversion is defined as the residue of an estate left in the grantor or his heirs, or in the heirs of a testator,

commencing in possession on the determination of the particular estate granted or devised. I have been thus particular in transcribing these statutory definitions of "expectant estates," to show, what is apparent, that they are not in the least applicable to the case under consideration. Though, as Chancellor WALWORTH said (in 7 Paige, 76): "They include every *present right and interest*, either vested or contingent, which may by possibility vest at a future day," yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living. The provision of the Revised Statutes, by which expectant estates are made alienable, no doubt covers the same class of interests which before were only assignable in equity. They are now assignable at law as well as in equity.

Kent says (4 Com. 370) that the grantor of an estate upon condition has only a possibility of reverter and no reversion; and in the note to page 11 of the same volume he says, "there is only the possibility of reverter left in the grantor and not an actual estate," citing Martin *v.* Strachan, 5 Term R. 107 (note). For examples illustrating the distinction between a naked possibility and a possibility coupled with an interest, see 4 Kent Com. 262, note b, and Jackson *v.* Waldron (13 Wendell, 178), and Fortescue *v.* Satterthwrite, 1 Iredell, N. C. R. 570.

Suppose A. sell to a banking corporation in fee, by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it to the expiration of its charter, it will revert to him, or, if he be dead, to his heirs. Now, what estate had A. after he had conveyed in fee to the bank? None whatever. He had only a possibility of a reverter—a naked and very remote possibility, but nothing that he could convey to an assignee. He had sold his entire interest and received the full value of it. The presumption was it would never return. The law would not favor its return, and the grantee, who enjoyed the entire estate

and upon whose volition alone it *could* return, would not be likely to so far neglect his own interests as to permit its return. A voluntary reconveyance would be hardly more improbable than a reverter. Just such an estate and no other had Dederer in this land when he conveyed to the plaintiff. In both cases the estates granted were upon condition. In the case of the bank the condition was implied in law: *Angell & Ames on Corp.* 128. In this case the condition was expressed.

What is meant by possibilities coupled with an interest is of a very different character, as may be seen by reference to 4 Kent Com. 262, and cases there cited, and 13 Wend., *supra*. Jicklings, in his treatise on the analogy between legal and equitable estates, says that under the generic term of possibilities coupled with an interest may be classed all contingent and executory interests in land, as springing and shifting uses, contingent remainders, and executory devises.

The cases cited by the plaintiff's counsel, for the purposes of showing that the common-law rule has been changed by the Revised Statutes have no applicability. In *Lawrence v. Bayard* (7 Paige, 70) the litigation was concerning personal property only, and the general remarks of the Chancellor, as to the extent of the change made by the Revised Statutes, I have already quoted.

Upon the whole, my conclusion in this case is that the Hudson & Delaware Railroad Company took from Dederer a fee upon condition subsequent; that at the time of the conveyance by Dederer to the plaintiff there had been no forfeiture, and that Dederer had, at the time of such conveyance, no assignable interest in the premises.

The judgment of the Supreme Court should be affirmed.

b

**License.**

**A license is an authority to do some act or series of acts on the land of another, without possessing an estate in the lands, as permission to fish, hunt, cut down trees, and do other like acts.**

**COOK v. STEARNS.**

**Supreme Judicial Court of Massachusetts, 1814.**

**11 Mass. 533.**

This is an action for trespass on the plaintiff's lands, committed by the defendant, who went thereon to remove obstructions and to repair a mill and dam which had been formerly erected thereon with the consent of the owner.

**PARKER, C. J.** The question presented by the demurrer and joinder in this case is, whether the facts set forth in the plea in bar amount to a justification of the trespass complained of in the declaration.

The possession of the *locus in quo* is admitted to be in the plaintiff; and no title to it is claimed by the defendant in his plea. But he claims a right to enter upon it, for the purpose of repairing the dam and bank, and clearing the canal from obstructions; because those whose estate the plaintiff now holds permitted him to enter and make the bank, and dig the canal; from which permission he would infer a right to enter and use the soil as often as the state of the mill owned by him should require it. He has not described the mill as ancient, nor set up any prescriptive right to an easement in the close of the plaintiff; but alleges that he had the *consent, legally obtained*, to erect his works, of the former owner of the close; and because of that consent, the works being out of repair, he entered to make the necessary repairs.

It is evident, therefore, that the defendant claims a permanent interest in the plaintiff's close, a right to maintain the bank, dam, and canal, which he formerly placed there by consent, and to enter upon the plaintiff's close at any time to make necessary repairs. Now, this is an interest in land,

which cannot, by our statute of 1783, c. 37, pass without deed or writing; for all interests in land, according to that statute, whether certain or uncertain, are declared to be estates at will, unless the evidence of them exists in deed or writing; and if a continuation of the interest is intended for seven years, it must not only be passed by deed, but the deed must be acknowledged and registered in the same manner as is required in the transfer of a fee.

The defendant not having alleged that he acquired the right, which he claims, by deed or writing, his plea is for that cause bad. After a verdict, perhaps, this defect would be cured, because it would be presumed that the evidence, which the law requires to establish such an interest as is claimed, had been exhibited; but on demurrer, where a right in land is set up as a satisfaction for a trespass, the manner in which that right was acquired should be averred, that the Court may immediately determine whether it was a lawful conveyance of the right or not.

But the counsel for the defendant, aware that they could not set up any estate of a permanent nature in the plaintiff's close, without averring and proving a deed or some other lawful conveyance, have considered the facts alleged in his plea as amounting to a license, given him by the former owner of the land, to make the dam, bank, and canal; and they have contended, first, that such license may be by parol; and, secondly, that it is not in its nature countermandable; from which they would infer that a right continues in him to maintain the dam, etc., and to enter upon the plaintiff's close to repair them *toties quoties*, etc.

This argument had some plausibility in it when it was first stated; but upon more mature consideration, it seems to have no foundation in principles of law.

A license is technically an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land; such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is

fixed, but irrevocable when executed. See Viner's Abridgment, title License, A, E, D, G, and the authorities therein cited, which have been examined and found to support the positions laid down by the compiler. It is also holden, that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such.

The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute. If the defendant had a license, from the former owners of the plaintiff's close, to make the bank, dam, and canal, in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act; but it did not carry with it an authority, at any future time, to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it, without any reservation, would of itself be a countermand of the license. For although, when one is permitted to do certain things upon the land of another, an implied authority is given to enter upon the land to do the thing, and to repair it, if it is of a permanent nature, yet the first permission or license must be by grant, in order to draw after it this consequence.

We are also all satisfied, that the plea is in this respect bad; it not showing such a license as may be pleaded, and, indeed, the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a posse-

sion or use as furnishes presumption of a grant; neither of which is averred in this plea.

If the defendant's plea were held to be a bar to the action, all the mischiefs and uncertainties, which the Legislature intended to avoid by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not on the land which they purchase.

It has been argued that, by the Act providing for the support and regulation of mills, a right to acquire property in the land of another, for the purpose of erecting or carrying on a mill, is contemplated to exist by parol. But that statute did not provide a mode of acquiring title to the mill or the land; but merely superadded the right of flowing land, upon compensation, according to the statute, by those who had legally obtained the right to build a mill.

The defendant's plea is adjudged bad.

#### *Revocation.*

**A parol license to enter his premises—as, upon his lands, into his house, or into his theatre—may be revoked by the licensor at any time.**

**McCREA v. MARSH.**

**Supreme Judicial Court of Massachusetts, 1858.**

**12 Gray, 211.**

McCrea, a colored person, bought a ticket to a Boston theatre. When he presented himself he was refused admittance on the ground of his color and his entrance was forcibly prevented. McCrea brought an action of tort against the defendant for this exclusion by force.

METCALF, J. It was correctly ruled, at the trial, that the plaintiff could not maintain this action, and that his remedy, if any, was by an action of contract. We therefore need not express an opinion concerning any of the other rulings.

Assuming that the plaintiff, by purchase of the ticket from the defendant, obtained permission to enter the family circle

in the Howard Athenæum, in his own person, and occupy a place there during the exhibition, yet it was "only an executory contract." It was a license legally revocable, and was revoked before it was in any part executed. After it was revoked, the plaintiff's attempts to enter were unwarranted, and the defendant rightfully used the force necessary to prevent his entry.

According to the decision in *Wood v. Leadbitter*, 13 M. & W. 838, even if the plaintiff had been permitted to enter the family circle, the defendant might have ordered him to leave it, at any time during the exhibition, and, upon his refusal, might have removed him, using no unnecessary force. The doctrine of revocable licenses was there thoroughly discussed, and the authorities analyzed, by Mr. Baron ALDERSON, and the case of *Tayler v. Waters*, 7 Taunt. 374, and 2 Marsh. 551, was overruled. See, also, *Adams v. Andrews*, 15 Ad. & El. N. R. 296; *Roffey v. Henderson*, 17 Ad. & El. N. R. 574; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Jamieson v. Millemann*, 3 Duer, 255.

The plaintiff is doubtless entitled to recover, in an action of contract, the money paid by him for the ticket, and all legal damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket.

Exceptions overruled.

*Wood v. Leadbitter*, 13 M. & W. 838.

#### *Oral or Written.*

This is true whether the license is oral or in writing, with consideration or without it.

*JOHNSON v. SKILLMAN.*

Supreme Judicial Court of Minnesota, 1882.

29 Minn. 95.

One Haynes owned land and gave permission to one Skillman to erect a dam near it to such a height that it would cause said land to be overflowed, provided that Skillman would erect and keep in operation a flouring mill where the dam was located; and Haynes also promised that this privilege

might continue so long as the mill was kept in operation. Relying on this, Skillman erected the dam and the mill. Afterward Haynes sold his land to Johnson, who knew at the time that the land was overflowed and also knew of the agreement between Haynes and Skillman. Johnson then brought an action to compel Skillman to remove the dam, or so much of it as should be necessary to prevent the overflowing of said land. The defendant claimed that he had a right to overflow the land under the agreement with Haynes so long as he kept up the mill.

VANDERBURGH, J. The parol agreement set forth in the decision of the trial Court created no easement in the land of plaintiff, but took effect as a parol license only. A license creates no estate in lands. It is a mere power or authority, founded on personal confidence, not assignable, and revocable at pleasure, unless subsidiary to a valid grant, to the beneficial enjoyment of which its exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity. This is the result of the best considered cases. The doctrine of the early cases, which converted an executed license into an easement, is now generally discarded as being "in the teeth of the statute of frauds." And, referring to these decisions, Mr. Chitty says, concisely: "However a Court of Equity might, under strong circumstances, interfere against such a party by injunction and decree a conveyance, it is clear that such a doctrine at law is not tenable." 1 Chitty, Gen. Pr. 339.

The cases of *Ricker v. Kelly*, 1 Me. 117, and *Clement v. Durgin*, 5 Me. 9, cited by defendants' counsel, have now little following, and the case of *Rerick v. Kern*, 14 Serg. & Rawle, 267, also relied on, which was an action at law for damages in favor of the licensee, is followed in but few States: *Houghtaling v. Houghtaling*, 5 Barb. 383; *Jamieson v. Millemann*, 3 Duer, 255; *Washburn on Easements*, 24.

A simple reference to some of the more important cases, in support of the views herein expressed, will suffice: *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. 380; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & Bat. (N. C.) 492; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107; *Woodward v. Seely*, 11 Ill. 157; *Wood v. Leadbitter*, 13 M. & W.

838; *Wiseman v. Lucksinger*, 84 N. Y. 31. In cases where the license is connected with a valid grant, as of chattels or fixtures, upon the land of the licensor, susceptible of being removed, it is subsidiary to the right of property, and irrevocable to the extent necessary to protect the licensee, and saves to him the right of entry—the right of possession following the right of property: *Nettleton v. Sikes*, 8 Met. 34; *Heath v. Randall*, 4 Cush. 195; *Wood v. Leadbitter*, *supra*. But where it is sought to couple with a license a parol grant of an interest in the realty, the attempted grant being void, the transaction remains a mere license: *Wood v. Leadbitter*, *supra*. A license is, of course, always a protection for acts done under it, and before revocation: *Pierrepont v. Barnard*, 6 N. Y. 279. In cases, however, of what are sometimes called negative easements, which are executed on the land of the licensee, a different rule prevails; as, where a man has an easement of light and air upon or over an adjacent lot, he may abandon the same, and license the erection, by his neighbor, of a building which shall extinguish such right, and the license become irrevocable: *Morse v. Copeland*, 2 Gray, 302; Goddard on Easements, 472.

Nor is it material that a mere license is or is not in writing, or upon a consideration. In *Jackson v. Babcock*, 4 John. 418, there was a sealed instrument, and in *Wiseman v. Lucksinger*, 84 N. Y. 31, there was both a writing and a consideration; but both were held licenses, and revocable. In such cases the question is one of interpretation as to the intent of the parties as evidenced by the writing, and, as Chancellor KENT remarks, the distinction between an easement and a license is sometimes quite subtle. And so, in a suit in equity brought to confirm rights and assure an interest, as upon a part-performance of a parol agreement alleged to be taken out of the statute of frauds (and otherwise void as a grant, but valid as a license), the question of interpretation of the terms of the agreement, and the intent of the parties, becomes a material one in the case: *Jackson & Sharp Co. v. Philadelphia, etc., R. Co.*, 11 Am. Law Reg. (N. S.) 374.

In the case before us the license has been revoked by the change in the title, with notice, however, to the grantee sufficient to bind him as to defendants' equities. As to equitable relief the affirmative is devolved upon the defendants to establish their right to it as claimed in the answer. The grounds upon which this is administered, whether it be for specific performance or be based upon estoppel for the prevention of fraud, are not exceptional or special to such cases as this, but the facts and circumstances must be such as to bring each case within established principles: *Jackson & Sharp Co. v. Philadelphia, etc., R. Co.*, *supra*, 381-2.

The form of the alleged agreement, as found by the Court, is that plaintiff's grantor verbally promised and agreed with defendants "that if they would erect a good custom mill" at a certain point, "he would give them the privilege of flowing his land so long as they would maintain such mill." Such an agreement might very properly be construed as intending to give an interest in the land, commensurate with a permanent right of occupancy thereof for mill purposes, and so be made the subject of equitable relief, on the basis of part-performance, had its terms been more definite. There may be specific performance in such cases, upon a proper showing, though the improvements and expenditures are entirely on the land of the licensee, and there be no other possession than that incident to the enjoyment of the privilege: *Brown on Stat. of Frauds*, § 466; *Story, Eq. Jur.*, § 759. Such a remedy is not, however, available here for several reasons.

In *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, the Court refused this relief, on the ground that the terms of the agreement were not clearly and definitely established. So, here, the terms of the agreement are altogether too general and indefinite. Neither the height of the dam nor extent of flowage allowed appear. In the second place, the Court finds "that the defendants, relying on said agreement, and in part induced thereby," erected, on their own land adjoining, a dam and mill at great cost. In the absence of any supporting evidence, we are left to infer that they were also influenced by other con-

siderations in the matter. The rule is quite strict that the alleged part-performance must be founded on and be referable solely to the agreement: *Wheeler v. Reynolds*, 66 N. Y. 227; *Wolfe v. Frost*, 4 Sandf. Ch. 72. *Thirdly*, there is left to the parties their statutory remedy to secure the right of flowage. There is nothing in the case to show that this remedy is not an adequate one, and just to both parties. In such a case equity will not interfere. In *Wiseman v. Lucksinger*, 84 N. Y. 31, the Court lay stress upon the fact (in refusing equitable aid) that the plaintiff might reasonably secure drainage for his lot in another direction than the one in controversy, though attended with more expense and labor; and in *Meynell v. Surtees*, 3 Smale & G. 101, a case in point, the Court denied relief on the ground that while proceedings were pending in Court to enforce an agreement for the possession of land, the right to secure the privilege under an Act of Parliament had been obtained. See, also, *Bankart v. Tennant*, L. R. 10 Eq. 141.

Judgment affirmed.

*Contra*: *Snowden v. Wiles*, 19 Ind. 10; *Lacy v. Arnett*, 33 Pa. St. 169.

#### *Effect of Conveyance.*

Such revocation may be made by a conveyance of the land, and without notice to the licensee.

**WILSON v. ST. P., M. & M. RY. CO.**

Supreme Court of Minnesota, 1884.

41 Minn. 56.

GILFILLAN, C. J. Block 1, Hopkins's addition to St. Paul, is bounded by Third, Fourth, Rosabel, and Broadway Streets, and the surface of the entire block was, at the time of the acts complained of, several feet below the surface of the surrounding streets. The land was wet. On it were springs, the water from which seems, unless carried off by drains, to have spread

over the surface of the block. The plaintiff was in possession, under a lease from the owner, of the north half of lot 5, which extended from Rosabel Street across the block to Broadway. On the west end of the half lot he had a building fronting on Rosabel Street, and occupied by himself as a hotel; on the east end he had another building fronting on Broadway, and occupied by a tenant of his. For the purpose of keeping the water drained off his premises he had constructed two drains—one on the half lot running east, and venting into the sewer under Broadway; the other running south, across that part of the block lying south of his half-lot and venting into the sewer under Third Street. No serious question seems to be made of his right to have and maintain the former of these drains. As to the other, it appears that, several years before the acts complained of, the then owner of the land across which it runs gave plaintiff oral permission (there being no consideration for the permission) to construct and maintain it. Pursuant to such permission he constructed the drain, and maintained it until the time of the acts complained of. After its construction the then owner of the land conveyed it to George C. Squires, and he conveyed it to defendant. Defendant also took a conveyance of plaintiff's half-lot, subject to his leasehold interest. In the fall of 1886 the defendant made preparations to erect a large building on the land thus acquired by it, and, as alleged by plaintiff, and as his evidence tended to prove, for that purpose it dug trenches, drove piles, destroyed the two drains, entered upon and injured plaintiff's half-lot. As a consequence of destroying the drains the water accumulated during the following winter on plaintiff's premises, and seriously injured the building occupied by him, and prevented his beneficial use of it. The main item of damage was that alleged to have been caused by so destroying the drains and causing the water to accumulate. The evidence indicates that the accumulation of water was mainly due to the destruction of the drain venting into the Third Street sewer. Hence the question of what liability was incurred by defendant by destroying that drain is important.

The plaintiff constructed and maintained that drain under a mere oral license from the owner of the land. Such a license is revocable at any time. This proposition follows necessarily from the law that interests in real estate cannot be created by parol. Such a license gives the licensee no right to continue doing what he is thus licensed to do, though, until revoked, it protects him from liability for acts done under it. To the rule that a parol license to enter on real estate is revocable there are some exceptions, though this case does not come within them. They save the right to the licensee, not to occupy the land permanently, but to do some single act upon it; as, if one sell a chattel situate on land of the seller, the purchaser to take it away, there arises by implication a license to the purchaser to enter upon the land for the purpose of removing the chattel, and this cannot be revoked until he has had a reasonable opportunity to do so. And a license to place a building on land cannot be revoked so as to prevent the licensee removing the building within a reasonable time. Where a license is revocable it is revoked by a conveyance of the land: *Harris v. Gillingham*, 6 N. H. 9 (23 Am. Dec. 701); *Cook v. Stearns*, 11 Mass. 533; *Bridges v. Purcell*, 1 Dev. & B. 492; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Seidensparger v. Spear*, 17 Me. 123 (35 Am. Dec. 234); *Carter v. Harlan*, 6 Md. 20. The license was therefore revoked by the conveyance of the original licensor, and, unless it was renewed by acquiescence of the grantee in the maintenance of the drain, it was entitled to cut no figure in the case.

The Court below, in its charge, treated the case as though the license had not been revoked. It charged that the owner of the property had the right to revoke it at any time, but qualified this with this instruction, to which there was a proper exception: "But if this drain was there upon the premises, had been there for years, and this defendant, when it went to improve, found it there, it was its duty either to give notice to the plaintiff that the license was revoked, or to take reasonable and proper means to prevent any damages arising from what it did in reference to stopping it up." This instruction as-

sumes that the existence of the drain on the defendant's land by mere naked license created a right in the licensee and a duty to him on the part of defendant that would prevent the latter using its land as, but for the existence of the drain, it might have done unless it first gave notice of a revocation. Under the evidence in the case, the jury must have understood this to mean express formal notice; for there could be little doubt on the evidence that the plaintiff had knowledge that the license had been revoked. Defendant had, with his knowledge, commenced on its land work, the prosecution of which necessarily prevented the continuance of the drain. It is probably true, in general, that the protection which the license affords the licensee in doing what it permits him to do continues until notice, so that he cannot be liable for acting under it until notice of revocation. This, however, has been held not to be the rule upon a revocation by a grant to a third person: *Wallis v. Harrison*, 4 Mees. & W. 538. We think the proposition in the charge is contrary to principle and authority—to principle because it attributes to a naked license the quality of creating a right which cannot be created by parol. Among the multitude of decisions on the subject of parol licenses we find but two precisely analogous to this: *Hewlins v. Shippam*, 5 Barn. & C. 221, and *Fentiman v. Smith*, 4 East. 107. In the former case the defendant had given plaintiff license to maintain a drain across his premises, and had without notice obstructed the drain, so as to prevent the water flowing through it. The action was for damages caused for so doing, and it was held that plaintiff could not recover, for that a right in the land could not be created by parol. The other case was similar to it, and there was a similar decision. As there will have to be a new trial for the error in this instruction, it is not necessary to consider any of the other exceptions, further than to say we see no error in them.

Order reversed.

*Harris v. Gillingham*, 6 N. H. 9.

*When Acted Upon.*

**Even if acted upon, and expenses are thereby incurred on the strength of the license, it may nevertheless be revoked.**

**MINNEAPOLIS MILL Co. v. M. & St. L. Ry. Co.**

Supreme Court of Minnesota, 1892.

51 Minn. 304.

**MITCHELL, J.** This action, which is one in ejectment, was before this Court on a former appeal: 46 Minn. 330 (48 N. W. Rep. 1132.)

On the first trial the District Court held that the defendant had acquired title by dedication to a public use. On the last trial it held, in substance, that it had acquired title through a parol contract or agreement with the plaintiff. The principal question is whether this finding was justified by the evidence.

It is conceded that the title to the land was originally in the plaintiff, and, of course, still is, unless it has in some way transferred it to the defendant. It is not pretended that the plaintiff ever executed any conveyance or any written agreement to convey to defendant; hence, if the title has ever passed, it must have been by virtue of matters entirely *in pais*.

The Court finds that during the year 1870, and for more than ten years thereafter, and until long after the defendant had taken possession of all the lands described in the complaint, and constructed its tracks thereon, William D. Washburn, C. C. Washburn, and Dorilus Morrison owned substantially all the capital stock of the plaintiff company, and, as its officers and directors, controlled its property, business, and affairs; that during the same time the plaintiff, its grantees and lessees, owned nearly all the water power and mill sites upon and along the west bank of the river at St. Anthony Falls; that during all of this time the two Washburns were stockholders and directors of the defendant company, and W. D. Washburn, as vice-president or president of the defendant, had on its behalf the management, control, and direction

of the location and construction of all its tracks, side tracks, and spur tracks upon the land in controversy, and upon or connected with the property of the plaintiff and the milling district in the city of Minneapolis. We assume that thus far the findings are supported by the evidence.

The Court then finds: "That during the same time the said plaintiff, by its said directors, for the purpose of increasing the value and availability for use of plaintiff's said property, and of increasing and hastening the development of manufacturing industries thereon, induced and procured the defendant to build and construct its railroad tracks upon the land described in plaintiff's complaint, and upon the agreement and understanding that, in consideration of the special benefits and advantages to plaintiff from such construction of defendant's tracks at that place, plaintiff would give to the defendant the possession and right of way for such tracks over such land of plaintiff, to be occupied by such tracks, as was not included in the deed of plaintiff to the defendant of May 31, 1871.

"That pursuant to such agreement and understanding, and at the instance of the Washburns, and with the full assent and knowledge of Morrison, and all other directors and officers of the plaintiff, and for the special benefit and advantage of the plaintiff, as well as for the use and advantage of the defendant, the defendant, at its own cost, built and constructed permanently all its tracks described in the complaint, and entered into the possession thereof, and has ever since occupied the same as part of its railroad connecting its main line with its yard on the east of said land in dispute, and also connecting said main line and yard with its tracks to mills upon plaintiff's milling property; and that defendant's railroad tracks upon said land in dispute have greatly facilitated the carrying on of milling and manufacturing on plaintiff's property, and greatly benefited and increased the value of such property.

"That upon the taking by said defendant at plaintiff's request, and constructing thereon for plaintiff's benefit, but at

its own cost, the railroad tracks of defendant, the plaintiff waived any further or other compensation for the land so taken than the special benefits to plaintiff's remaining property resulting from the construction and permanent use in that place of such railroad tracks. That, besides the cost of construction of said tracks, defendant has since, to the knowledge of plaintiff's directors and officers, expended large sums of money in repairs and replacement of such tracks and in construction of bridges for such tracks over said avenue (Tenth Avenue south), without any objection by plaintiff, or any notice that defendant's right to maintain and occupy said land permanently with said tracks was denied or disputed by plaintiff."

An examination of the record compels the conclusion that these findings, so far as material to the issues in the case, are not supported by the evidence.

There is no doubt of the correctness of the proposition announced by the trial Judge in his memorandum, that, if a landowner, in consideration of special benefits to his property to be derived from railroad facilities, agrees to give the right of way to a railroad company, and accepts such special benefits as full compensation, and the railroad company accepts the offer, and builds its road, and affords such special benefits, the contract is as binding as if the railroad company had paid for the right of way in money. But the difficulty in this case is that there is an entire lack of evidence of any such agreement. There is not an intimation by any witness that any express agreement to that effect was ever made. If found to exist, it must be wholly implied from the conduct of the parties. What the learned trial Judge probably meant was that the conduct of the plaintiff had been such as to estop it from now denying that there was such an agreement, and that consequently the situation is to be treated as equivalent to part performance of a parol agreement for the sale of an interest in real estate.

But the case is equally lacking in the essential elements of an estoppel *in pais*. Doubtless the plaintiff was interested in having defendant's road extended down into the milling dis-

trict, thereby enhancing the value of its property. But the defendant was organized for pecuniary profit, and doubtless expected a return for its expenditures from the business to be obtained from the mills and other manufactories in that locality.

In view of this and the additional fact that the same men were the active managers of both corporations, it was naturally to be expected that they would to a certain extent work together for their common interests. But, as both were acting through the Washburns as their common agents, it can hardly be claimed that one was misled or deceived by the acts or conduct of the other.

It appears that in 1871 the defendant purchased of the plaintiff a tract of land south of the milling district proper for terminal grounds; also, that other tracts in that vicinity were at different dates purchased of plaintiff by defendant. It also appears that in 1871 the defendant built a track down Second Street, to the terminal grounds already referred to, and that this track was the only one built until 1875 or 1876. It further appears that some condemnation proceedings were instituted to secure the right of way for this track; but finally, on September 20, 1873, the plaintiff conveyed to defendant for right-of-way purposes a strip through its property thirty feet wide, being fifteen feet on each side of the centre line of this track. The boundaries between the lands of the plaintiff and those of the defendant were undefined, and undefinable except by actual survey. Subsequently to 1875 or 1876 additional tracks seem to have been built from time to time, as the increasing business of the railway company and of the mills in that vicinity required, some of which were outside of the land of the railroad company, and upon the land of the mill company, as subsequent surveys have proven. No witness testifies to any conversation or transaction pertaining to the building of any of these tracks, or to the facts or circumstances of the first occupation of the land in controversy by them. It does not appear that when they were built either plaintiff or defendant knew they were on plaintiff's land. In

fact, it affirmatively appears that when Washburn caused them to be constructed he supposed they were being built on the land owned by the railroad company, and that he did not knowingly or intentionally construct tracks upon land not acquired by it by contract or deed from the mill company. It also appears that the mill company did not know that the tracks extended over onto its land until a survey was made in 1886 or 1887. There is also an entire lack of evidence that the mill company either requested or induced the railway company to build these tracks where they are located or at all. The facts probably are that neither party knew exactly where the lines of their respective properties were, and that so long as their interests did not conflict neither was very particular to ascertain.

The most, we think, that can be possibly claimed from the evidence is that the tracks were built under a parol license from plaintiff; and there is nothing better settled than that a mere license, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in land, even though granted for a valuable consideration, and though the license may be for a purpose which involves the expenditure of money upon the faith of it. The mere fact that the mill company might have, without objection, permitted the railway company to expend large sums of money in building tracks on the land on the faith of the license would not operate as an estoppel. A licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and if he expends money in connection with his entry upon the land of the latter he does so at his peril. Any other doctrine would render most licenses irrevocable, and make them operate as conveyances of an interest in land. As to private persons entering as licensees the rule is well settled everywhere. In some jurisdictions a partial exception seems to have been made in favor of railway companies, the Courts holding that if a railway company has entered and built its road under license from the landowner, he will be barred from maintaining ejectment, but will be left to

his action or proceedings to recover compensation for the permanent taking of the land. This seems to be placed on the ground that considerations of public policy forbid that the continuous operation of the road should be interrupted. But this distinction in favor of railway companies has been expressly repudiated by this Court for reasons stated in *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321 (48 N. W. Rep. 1129).

The principle upon which Courts of Equity sometimes apply the doctrine of equitable estoppel to cases where the entry has been under a license is that the conduct of the licensor has been such that it would be a fraud on the licensee to permit the licensor to deny that there was a contract for an interest in the land, and hence they treat the case as one of a parol contract partly performed, which the Court will enforce. But in this case there was an entire absence, not only of any actual contract between the parties, but also of any fraud, deception, or misrepresentation. If neither party knew that these tracks were being built on plaintiff's land, of course there could have been no deception, nor could either party have been misled by the other. On the other hand, if both parties were aware of the fact, and the plaintiff gave defendant license, either express or implied from acquiescence to enter its land, there was still no deception or misrepresentation. All that defendant could complain of in such case is that plaintiff has seen fit to revoke a license, which, perhaps, the defendant thought would never be revoked.

Again, if any implied agreement as to defendant's occupancy of plaintiff's land could be inferred, the terms are so indefinite and uncertain as to the extent or character of the privilege given, if any, that it would be utterly impossible to determine what it was. How many tracks, or where to be located, no Court could possibly determine from any evidence in the case. The fact is that the entire evidence is of the most nebulous and illusive character. Throughout the entire case there seems to have been a commingling and confounding of various and independent entries upon plaintiff's land, as well as upon the land of other parties, at wholly distinct periods of

time, and an attempt to treat the evidence as to all as applicable to and determinative of the legal character of each, which could only be permissible if there had been some previous agreement between the parties under which all the entries had been made, and to which they were referable.

Without going further for authorities, it seems to us that under the present condition of the evidence the principles announced in *Watson v. Chicago, M. & St. P. Ry. Co., supra*, and *Johnson v. Skillman*, 29 Minn. 95 (12 N. W. Rep. 149), are entirely decisive of this case.

2. Upon the question as to what land was conveyed by plaintiff to defendant by the deed of September 20, 1873, which depended upon the location at that date of defendant's original track, which was made the centre line of the strip conveyed, all we deem necessary to say is that the evidence fully justified the finding of the trial Court.

3. On the first trial the defendant produced a witness, one Fuller, who was examined and cross-examined, and his testimony taken down in full by the official reporter or stenographer of the Court. Upon the second trial, it being made to appear that Fuller was a non-resident of this State, and a resident of the State of Washington, and had at no time since the first trial been within this State, the Court, under the objection and exception of the plaintiff, admitted the testimony of the witness as given on the first trial. As to when the testimony of a witness given on a former trial of the same issues between the same parties should be admitted in evidence, the Courts, both English and American, are not entirely agreed. Starkie, in his work on Evidence (page 310), says the prevailing English rule is to admit the deposition of the witness, not only where it appears that he is dead, but in all cases where he is dead for all the purposes of evidence; as, where he cannot be found after diligent search, or resides in a place beyond the jurisdiction of the Court, or where he has become a lunatic or attainted.

In Greenleaf on Evidence (§ 163) the rule is laid down quite as broadly. This, however, has been criticised as too broad by

some Courts, which hold that, to make the testimony admissible, it must appear that the witness is dead, insane, or by physical disability at the time of the trial unable to be examined, or that he is absent by the act or procurement of the party against whom the evidence is offered, or that his whereabouts cannot be ascertained, so that by the exercise of due diligence his deposition could not be taken. See 1 Greenl. Ev., § 163, and note; 1 Phil. Ev. 393, and note 114.

The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine, neither of which applies to testimony given on a former trial. The real objection to such evidence is that it is only the testimony of some one else as to what the witness swore to on the former trial; and before the day of official reporters in our trial Courts the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, Courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official Court stenographer, this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition, taken out of the State, would be. Rules on such subjects should be practical, and subject to modification as conditions change. We think the evidence was properly admitted, but for reasons already given the order appealed from must be reversed, and a new trial granted.

*Kremer v. R. R. Co.*, 51 Minn. 15; *Crosdale v. Lanigan*, 129 N. Y. 605; *Village of Dwight v. Hayes*, 37 N. E. Rep. 218.

*Exceptions.*

**But if the license is subsidiary to a valid grant, it is irrevocable.**

**NETTLETON v. SIKES.**

Supreme Judicial Court of Massachusetts, 1844.

8 Met. 34.

The plaintiff owned certain lands. He agreed that the defendant might cut down trees thereon and take away the bark to his own use. After defendant had cut the trees under the contract and peeled them, plaintiff forbade him to go upon the land and take the bark away; but not heeding this, defendant took away the bark, and plaintiff brings an action of trespass.

**WILDE, J.** We think it very clear that the instructions to the jury were correct, and are sustained by the authorities. Such an oral contract as was proved to the satisfaction of the jury, in this case, is obligatory on the parties, and is not within the statute of frauds: *Claflin v. Carpenter*, 4 Met. 583, and cases there cited. A beneficial license, to be exercised upon land, when acted upon under a valid contract, cannot be countermanded: *Tayler v. Waters*, 7 Taunt. 384; *Liggins v. Inge*, 7 Bing. 682; *Whitmarsh v. Walker*, 1 Met. 316.

In the present case, when the bark was peeled, it became the property of the defendant, by the terms of the contract; and if the plaintiff had taken it away, he would have been liable to the defendant in an action of trover. The bark being the property of the defendant, and being on the plaintiff's land with his consent, and in pursuance of the contract, he had no right to prevent the defendant from taking it away. See *Wood v. Manley*, 11 Adolph. & Ellis, 34.

Exceptions overruled.

A license is always a defense for acts done under it before revocation: *Pierrepont v. Barnard*, 6 N. Y. 279. See, also, *Morse v. Copeland*, 2 Gray, 302.

*Equitable Estoppel.*

After a license has been given, and the licensee, through the fraudulent conduct, declarations, or concealment of the licensor, has incurred expenses of money, or otherwise, so that a revocation of such license would work a fraud upon the licensee, then equity will interfere and protect him under the doctrine of equitable estoppel.

JACKSON & SHARP Co. v. P., W. & B. Ry. Co.

Court of Chancery, Delaware, 1871.

4 Del. Ch. 180; 11 Am. L. Reg. (N. S.) 374.

Jackson & Sharp erected car works on land adjacent to the railroad tracks in Wilmington, and applied to the railroad company for an extension of its track over the land of the company up to the car works. The application was granted, and the company constructed its track to the land of Jackson & Sharp, where the same was continued over the land of the latter to the shops. This track was used for seven years, and a controversy arising between the parties, the railroad company gave notice of its purpose to take up its track. Complainants file a bill in equity to enjoin the company from so doing.

THE CHANCELLOR. The claim made on the part of the complainants to the perpetual use of the side track in controversy as a legal right is based upon two grounds. One of these is, that the right was acquired by contract between their predecessors, Jackson & Sharp, and the Railroad Company—the other, that even were there, in the first instance, no contract, but only a permissive use of the track under a license, still, that the license, having been acted upon in the expenditure of large sums of money on the faith of its indefinite continuance, has become irrevocable under the doctrine of equitable estoppel.

First, is the question of contract. Here it may be well to notice, that the point to be inquired of is, not whether upon the application of Jackson & Sharp to the officers of the Railroad Company, a side track was promised and afterward laid, but whether the transaction included a stipulation by the company, express or implied, for the perpetual use of the side track by Jackson & Sharp and their assigns, as a right appur-

tenant to the car works. Now, in the view which I take of the facts, it becomes immaterial that the right claimed is an interest in real estate, such that under the statute of frauds a contract for it is required to be in writing; for it seems quite certain upon the proofs that there was no contract, either written or verbal, conceding to Jackson & Sharp and their assigns, the perpetual use of this side track as a right, or in any degree restricting the power of the Railroad Company, as owners of the soil, to take it up at their pleasure. The case—upon the question of express contract—rests upon the testimony of Mr. Jackson, of the firm of Jackson & Sharp, and Mr. Felton, the then President of the Railroad Company, who represented the parties in the original transactions and between whom the contract, if there was any, must have been effectuated. Both these gentlemen testify with evident candor and caution, and without any material discrepancy in their statements. The result of their testimony is, that at some time early in the commencement of the car-work enterprise, after the selection of the site for the works, but whether before or after their erection does not appear, Mr. Jackson on behalf of his firm applied to the officers of the Railroad Company for a connection between the car works and the railroad. The application was acceded to and after some delay the connection was made, deliveries of freight and manufactured cars being meanwhile effected by temporary expedients. Not a word, however, appears to have passed, intended to define the respective rights of the parties in the side track after it should be laid or to prescribe any term or condition of its continuance, whether, on the one hand, it should remain for the permanent accommodation of the car works as an easement appurtenant to them and beyond the power of the Railroad Company to terminate it, or whether, on the other hand, its continuance was to depend upon the mutual interest and good will of the parties. Mr. Jackson does not state that there was any stipulation for the permanence of the side track—not even that he understood such to be the purport of the promise to lay the track made in response to his application for it. Mr.

Felton, the President of the Railroad Company, under whose direction the connection was made, negatives any such stipulation by stating in substance, that he directed the connection in the usual course of the granting of such accommodations and subject to the general understanding in such cases, that the tracks forming the entire connection should remain under the control of the respective owners of the land on which different portions of it might be laid, without prejudice (as he must be understood to mean) to any right of property on either side. It may then be safely concluded that there was no express contract.

But it is argued that a contract may be implied from the acts of the parties. And the principle sought to be applied at this point of the argument was one announced by C. J. GIBSON, in the Pennsylvania cases of *Rerick v. Kern*, 14 S. & R. 267, and *Swartz v. Swartz*, 4 Barr, 353, that the grant of a privilege which is accessory to a permanent business is presumed to be commensurate in duration with the business, and although at first but a license and as such revocable, yet that when acted upon in the expenditure of money it becomes a contract for a valuable consideration, to be executed by a Court of Equity as a contract part performed. It will be observed, that this principle must depend, for its application to any particular case, upon the presumed intent of the parties that the privilege granted in such case should be commensurate with the business to which it might be necessary as a right, *in all events* and not as an arrangement depending upon the will of the parties for its continuance. Ordinarily, such a presumption may be a reasonable one. In the Pennsylvania cases it was clearly so. But after all, this presumption, or to speak more accurately, this inference as to the intent of the parties, is one controlled by the circumstances of the particular case, and may be wholly countervailed by evidence demonstrative that the privilege in question was in fact granted and accepted not as a perpetual, indefeasible right, but as a voluntary accommodation, to abide the good will and mutual interests of the parties. Such, in the present case, is the construction which

the evidence obliges me to give to the acts of the parties. As this view is the one decisive of the case, some explanation of the reasons for it is due to counsel.

In the first place, then, I lay out of consideration, as a ground for inferring the concession of a perpetual right to the use of this side track, the great value of such a right to the ownership of the car works. For opposed to this, as a ground for such an inference, is a consideration of hardly less force, which is the interest of the Railroad Company to preserve unimpaired its proprietary control over its road-bed and side tracks. And in addition to this, is its obligation as a public corporation, to keep its road, while held for the purposes of the incorporation, unincumbered by private rights or easements of a permanent nature, such as might under any circumstances embarrass its use as a public highway of travel—an obligation held in the late Pennsylvania cases, to be of so much force as to qualify the doctrine of *Rerick v. Kern*, that a license is presumed to be commensurate with the business to which it is necessary, so as to leave that doctrine not applicable to licenses by railroad companies affecting lands held by them to corporate uses: *Heyl v. The Philadelphia, Wilmington & Baltimore Railroad Company*, 5 Pa. St. 469; *Wunderlich v. The Cumberland Valley Railroad Company*, a late case in the Supreme Court of Pennsylvania, not yet reported. The principle of these cases does not go so far as to preclude a railroad corporation from granting private rights or easements in its lands, to be exercised subject to its paramount obligations to the public; but it offers a strong ground against presuming such grants in the absence of express stipulations—such as would be proper in order definitely to limit or qualify the rights granted, as rights subordinate to the public obligations of the company.

It is clear then that the relative interests of these parties, the one in acquiring and the other in withholding a perpetual easement in the side track, can afford no legitimate ground of inference as to whether or not the track was laid with an intent to confer such an easement. That is a question to be de-

terminated rather by the transactions between the parties than by their respective interests.

Taking up then, for this purpose, the evidence of the transactions between the parties, I am met at the outset by a fact of irresistible force, disclosed in the testimony of Mr. Felton, the then President of the Railroad Company, by whom the side track was directed to be laid, viz.: that the track was laid according to the usual course of granting such accommodations by the company to business establishments located along its road, it being the general understanding in such cases, that the continuance of the accommodation was to be voluntary on both sides, prejudicing no right of property in the soil, but leaving to the company the absolute control over its own track, with the like control in the owner of the connected works over the track laid upon his land. And it further appears that it was with this reserved control, tacitly understood by the parties concerned, that the connections similar to the one in question had been made between other works and this same side track, prior to its extension northward of Seventh Street to the car works of Jackson & Sharp—on which latter point Mr. Felton is corroborated by testimony drawn from the connected works below Seventh Street. Against the force of this evidence the testimony of Mr. Jackson, who acted for his firm, proves not only no stipulation with him varying the usage obtaining under other connections of this nature, but not even his own understanding or impression that the Railroad Company intended to concede the perpetual use of the side track as a right, or upon any other than the usual tenure of such accommodations, viz.: mutual interest and good will. And, then, in addition to all this, is something quite inexplicable, upon the theory of a negotiation looking to a perpetual connection with the railroad, as a legal right appurtenant to the car works, that is, the omission of Jackson & Sharp to seek a grant in writing, for securing a title so important; and the omission of the Railroad Company also in the concession of a right so seriously affecting their property, to impose some written conditions touching the maintenance and mode of using the side

track. On the whole, gathering the intention of these parties, as we are left to do, from their acts, without any direct expression of it, I can construe this transaction only as a parol license for the permissive use of the side track, and not as a contract for the right, express or implied. Let us then proceed to consider the case in the aspect of a license.

On this branch of the case there are several material points upon which no controversy was raised in the argument. One of these is, that the right claimed for the complainant is to an easement or interest in the land of the Railroad Company, the claim being to the perpetual use of the side track as a right appurtenant to the car works, transmissible with the title to them, and binding the land of the company into whosoever hands it may come, at least so long as it shall be used for the purposes of a railroad. *Pitkin v. The Long Island Railroad Company*, 2 Barb. Ch. R. 221, is a case very similar. Further, it is agreed that *at law* an estate or interest in land can be created only by deed or grant under seal, or by prescription, or in this country by twenty years' adverse possession or user; *in equity* such an interest may additionally be acquired by contract, which, however, must, under the statute of frauds, be in writing, subject to an exception of the equity arising out of part performance of a verbal contract. Again, it must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor, does it matter whether the license be by parol or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances, to be presently noticed, it may be in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license *at law* to create or transfer

an interest in land. In England the leading cases are *Fentiman v. Smith*, 4 East, 107; *Rex v. Herndon on the Hill*, 4 M. & S. 565; *Hewlins v. Shippman*, 5 B. & C. 221 (11 E. C. L. 207); *Bryan v. Whistler*, 8 B. & C. 288 (15 E. C. L. 149); *Cocker v. Cowper*, 1 C. M. & R. 418, and *Wood v. Leadbitter*, 13 M. & W. 838, in which last case the prior course of decisions is very fully reviewed. In this country the same rule was adjudged, as early as 1814, by C. J. PARSONS, in *Cook v. Stevens*, 11 Mass. 533. He has been followed in many of the States: *Mumford v. Whitney*, 15 Wend. 384; *Foot v. The N. H. & Northampton Railroad Company*, 23 Conn. 214; *Foster v. Browning*, 4 R. I. 47; *Den. v. Baldwin*, 1 Zabriskie, 390; *Hays v. Richardson*, 1 G. & F. 38; *Carter v. Harlan*, 6 Md. 20; *Bridges v. Purcell*, 1 Dev. & Bat. 492.

But it was earnestly urged that although a license is revocable so long as it is executory and the parties remain in *status quo*, it ceases to be so, under the doctrine of equitable estoppel, after it has been executed, the licensee having expended money or otherwise involved himself so that he cannot recede without prejudice; that in this case Jackson & Sharp having made large expenditures in erecting and afterward enlarging their car works upon the faith of their enjoying the continued use of this side track, the Railroad Company are equitably estopped from revoking the license.

Were this a case in a Court of Law, the answer would be that at law a license can under no circumstances become irrevocable by estoppel *when the effect would be to create an interest in land*. The doctrine of equitable estoppel, although largely adopted in Courts of Law and frequently so applied as to render licenses irrevocable, has been held not to apply to licenses, which, if rendered perpetual, would amount to an easement in lands. The reason is a plain and necessarily conclusive one, viz.: that Courts of Law do not recognize mere equities, such as arise out of an equitable estoppel enforced against the legal owner of lands; but they deal only with legal estates, such as are acquired through legal forms of conveyance, or their equivalent under the statute of limitations, an adverse

possession, of twenty years, or at least by writing under the statute of frauds. Hence, a mere license affecting lands is at law always revocable, even though granted for a valuable consideration, as in *Fentiman v. Smith*, 4 East, 107, and *Wood v. Leadbitter*, 3 M. & W. 833, and although the licensee may have expended money under it, which was a feature of many of the cases before cited.

It is true, however, that, in this Court, equities in land, though not created by any deed, grant, or writing whatever, but springing out of the acts and relations of the parties, are largely enforced, and among these a large class are those which arise under the doctrine of equitable estoppel applied to prevent constructive fraud—as where one having title to land is knowingly silent in the presence of an innocent purchaser from a third person, or where one knowing his title to land silently permits another ignorantly to build on it—in these, and in like cases, this Court, in order to prevent fraud will raise out of the transaction an equity in favor of the party misled, binding the conscience of the owner and restraining the exercise of his legal rights against such party. No reason is perceived why, in a proper case, the same principle should not in equity restrain the revocation of a privilege affecting the use of land. But it must be carefully observed that this principle of equitable estoppel proceeds upon the ground of *preventing fraud*. Its effect, when applied, is to restrain a party from exercising his legal right, and this even a Court of Equity cannot do unless there have been on his part some conduct, declaration, or improper concealment, misleading an innocent person to his prejudice and rendering the assertion of the legal right as against such person an act of bad faith, amounting to constructive fraud. Moreover, it may be well added that to warrant the interference of the Court with the legal right or title of a party, the case relied on to work the estoppel must be clear, beyond doubt, upon the facts. And the more stringently do these rules apply in a case such as this, where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege,

temporary and revocable, into an easement in the licensor's land, perpetually binding it and transmissible from the licensee.

It is a fatal infirmity in this branch of the complainant's case that there was nothing in all the communications had between the officers of the company and Jackson & Sharp, or in the conduct of these officers, to justify Jackson & Sharp in assuming that the company, by granting the accommodation applied for, intended to relinquish any right of property in the soil. It is agreed that no stipulation or promise to that effect was expressed. For reasons before fully stated and which need not be repeated, Jackson & Sharp were not warranted to infer so grave a concession by the company, as the relinquishment of its proprietary control over its soil, from the bare fact that on their application the side track was laid, nor from its importance as a right appurtenant to the car works; nor did the general usage connected with the granting of this sort of accommodation by the Railroad Company justify the inference that a perpetual easement in this track was conceded; but the usage was to the contrary. Looking to all the circumstances of the case, it is my conviction that although the connection of the car works with the railroad was doubtless contemplated on both sides as one to be in fact permanent, yet that no stipulation to that effect was asked or given, or supposed by either party to have been given; but that the arrangement was tacitly left to rest upon the general understanding with respect to such accommodations, Jackson & Sharp either not anticipating the contingency which has now happened, or trusting to the mutual interest and good will of the parties as a sufficient guarantee for the permanence of the connection, without securing it as a legal right according to prescribed forms of law. Their disappointment certainly involves them in no little hardship. But hardship is not a ground for equitable relief, except in favor of one who, without any negligence in securing his rights by the appropriate legal modes, has been misled to his prejudice through some fraud or laches of the party against whom the relief is sought,

or by such conduct of the latter as renders it an act of bad faith to take advantage of the mistake.

The injunction must be dissolved and the bill dismissed.

But many cases hold that a license is irrevocable simply if expenditures have been made on the strength of it: *Clark v. Glidden*, 60 Vt. 702; 15 Atl. Rep. 358; *Southwestern Ry. Co. v. Mitchell*, 69 Ga. 114; *Wilson v. Chalfant*, 15 Ohio, 248; *Hodgson v. Jeffries*, 52 Ind. 394; *Gibson v. St. L. Agri. & M. Assn.*, 33 Mo. App. 165; *School District v. Lindsey*, 47 Mo. App. 134.

**IV****ESTATES IN RESPECT TO THE NUMBER AND  
CONNECTION OF THEIR OWNERS.****A****ESTATES IN SEVERALTY.**

One holds lands in **severalty** when he "holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein."—2 Bl. Comm. 179.

**B****JOINT ESTATES.**

Two or more persons may hold lands by the following tenancies:

1

**TENANCY IN COMMON.**

"Tenants in common are such as hold by separate and distinct titles but by unity of possession."—2 Bl. Comm. 191.

**CARVER v. FENNIMORE.**

Supreme Court of Indiana, 1888.

116 Ind. 236.

MICHELL, J. Complaint by Esther J. Carver against Joseph Fennimore, in which the plaintiff alleged that the defendant was indebted to her in a specified sum for the one-third of the profit, use, and occupation of a certain lot or tract of land in the town of Alexandria, in Madison County.

Issues were made which were tried by a jury, who returned a verdict for the defendant.

The questions for decision will be understood by the fol-

lowing statement of facts: In 1857 Ira K. Carver, the plaintiff's husband, was the owner of eighty acres of land adjoining the town of Alexandria, which he conveyed by a deed of general warranty to his brother, William Carver. The plaintiff's name was signed to the deed without her knowledge or consent, and she remained in ignorance of the conveyance until after the death of her husband, which occurred in April, 1875. She then learned of the conveyance, and that her signature appeared on the deed, whereupon, on the 26th day of February, 1876, she instituted suit in the Madison Circuit Court against William Carver and about twenty others, who claimed different parcels of the land as grantees under him, to set aside the deed, for possession, and to have the title to the land quieted in her. This suit was pending in the Circuit Court until April, 1879, when the plaintiff recovered a judgment and decree against all the defendants in that suit, establishing and quieting her title to, and right to the immediate possession of, the undivided one-third of all the lands so conveyed, and for \$125 damages against William Carver. An appeal was taken to this Court, where the judgment was afterward affirmed on the 16th day of October, 1884: *Carver v. Carver*, 97 Ind. 497.

William Perry owned the lot, for the use and occupation of which the plaintiff seeks to recover in the present action, at the time the suit above mentioned was commenced, and he was duly summoned as a party thereto. Pending the suit Perry conveyed by warranty deed to Mrs. Fadley, who made valuable improvements on the lot, and who, subsequently, in April, 1880, while the appeal was pending in this Court, conveyed to the appellee, Fennimore. At the time the suit for possession was commenced the lot was unimproved, and the value of the use was merely nominal.

The question now is whether or not Fennimore is liable for the use and occupation of the land, and if he is, whether or not the rental value is to be estimated according to the condition of the land prior and without reference to the improvements placed thereon by his grantor pending the suit, or

whether he must account for the value of the use of the land with the improvements?

On behalf of the appellant it is contended that the only defense the appellee was legally entitled to make was as to the rental value of the property as it was when he had possession of it; that the judgment and decree in the former suit determined all questions as to the value of the improvements upon the real estate.

It may be conceded that the former judgment and decree settled conclusively all questions concerning the ownership of the land, and of the title to the improvements which had become a part of the freehold, whether such improvements existed thereon when the action was commenced or were made pending the litigation. This concession, however, does not dispose of nor materially affect the questions for decision in the present case. The effect of the decree in the former suit was to declare and conclusively establish the fact that the appellant was the owner of an undivided one-third of the property in dispute, and that she was entitled to occupy the legal relation of tenant in common with those who claimed title to the lot under the deed of her deceased husband. That question is no longer open to debate, but the rights and obligations of the co-tenants, as such, in respect to the improvement or enjoyment of the common estate, had not been adjudicated.

The relation of tenant in common arises "where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, *i. e.*, no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits:" Rapalje & Lawrence Law Dict., tit. "Tenancy in Common."

That one tenant may exclude the other from or deny his title to the common estate does not destroy the legal relation or the respective rights and remedies of co-tenants, if they be in fact owners in common, nor does a decree establishing and quieting the title of the excluded tenant necessarily de-

termine the rights of the parties as regards an equitable accounting in an appropriate proceeding in respect to use and occupation, nor in respect to improvements made in good faith by the occupying tenant: *Carver v. Coffman*, 109 Ind. 547.

The decree conclusively establishes the fact of common ownership in the property, but it does not necessarily settle the equities between the parties growing out of the occupancy or improvement of the common estate.

Notwithstanding the statute, § 288, R. S. 1881, which declares in effect that a tenant in common may maintain an action against his co-tenant for receiving more than his share or just proportion, the settled rule is that a co-tenant can only be compelled to account in case he has actually received rents from a third person, or when he has entered upon and held exclusive possession of the whole estate in hostility to and to the exclusion of his co-tenant: *Humphries v. Davis*, 100 Ind. 369, and cases cited; *Carver v. Coffman*, *supra*, and cases cited; *Osborn v. Osborn*, 62 Texas, 495; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Early v. Friend*, 16 Gratt. 21 (78 Am. Dec. 649, and note); *Kean v. Connelly*, 25 Minn. 222 (33 Am. Rep. 458).

It appears that the appellee and his grantors occupied the whole estate, denied the right of the appellant and contested her claim to an interest in the common property. She is, therefore, entitled, within the rule above declared, to an accounting for her just proportion of the use and occupation of the lot in controversy: *Freeman Co-Tenancy and Par.*, §§ 275, 277.

The instructions of the Court relevant to the features of the case above considered were substantially in consonance with the foregoing conclusions.

In refusing an instruction asked by the appellant and in the admission of evidence, the Court proceeded upon the theory that the liability of the defendant was to be determined upon the basis of the rental value of the property in the condition it was prior to the making of the improvements thereon

by the occupying claimants. This, the appellant contends, was an erroneous theory. The action by one co-tenant against another for an accounting for rents is a liberal and equitable action, and equitable defenses may be made, and in such a case, if the excluded tenant receives actual compensation for the damages sustained, he has no just ground of complaint. Unless, therefore, some peculiar circumstances are shown, the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession.

The excluded owner or tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the *bona fide* occupant, or by his grantor from whom he purchased: *Morrison v. Robinson*, 31 Pa. St. 456; *Pickering v. Pickering*, 63 N. H. 468.

This rule is in analogy to that prescribed by the statute governing the rights and liabilities of occupying claimants, and has, besides, the support of reason and authority: *White v. Stuart*, 76 Va. 546, 567; *Early v. Friend*, *supra*.

The defendant, and his grantor who made the improvements, went into possession of the whole lot under a duly acknowledged and recorded deed, to which the plaintiff's name as well as that of her husband appeared to have been signed. It turned out that the plaintiff's signature thereto was without authority, and the persons in possession were the owners of only an undivided two-thirds of the property after the death of the husband. It could hardly have been expected that they would surrender the whole lot upon the institution of the suit by the plaintiff, notwithstanding the deed from Ira K. Carver and wife, which appeared to have been made in 1857, nor were they bound to have the property lie idle, unproductive and unimproved, or take the chance of paying

an enhanced value for the improvements which resulted from their own enterprise: *Ford v. Knapp*, 102 N. Y. 135 (55 Am. Rep. 782).

This results in no injustice to the plaintiff, while to adopt the measure of damages contended for would be inequitable and injurious to the defendant.

While a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled to compensation for improvements so made, he is, nevertheless, entitled to have them considered when called to account in an equitable action for rents and profits.

There are no circumstances disclosed in the present case which equitably entitle the appellant to the rental value of the land with the improvements. What the rights of the parties may be in respect to the improvements in any other proceeding than the present is not here considered nor determined. These considerations lead to an affirmance of the judgment.

Judgment affirmed, with costs.

*Lamb v. Danforth*, 59 Me. 322.

2

JOINT TENANCY.

Two or more persons may hold lands in fee simple, fee tail, for life, for years, or at will, as joint tenants, when they have "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."

*THORNBURG v. WIGGINS.*

Supreme Court of Indiana, 1893.

34 N. E. Rep. 999; 135 Ind. 178.

DAILEY, J. This was an action instituted in the Court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel

Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th "day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph Circuit Court for the sum of \$403.70 and costs, against one John T. Burroughs and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof, taken as the property of said appellant, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the 8th day of June, advertise the same for sale on the 3d day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined from so doing by the Court; that said Daniel S. Wiggins has no interest in said premises, subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellee's title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out

as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph County, in the State of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the Court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but, upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation and they cannot arise, except by the instrument providing for such tenancy: *Griffin v. Lynch*, 16 Ind. 396.

The 9th Am. and Eng. Ency. of Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personality vests in them both equally . . . they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seized not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seized of the whole, and each being seized of the entirety, they are called tenants by the entirety, and the estate is an estate by entire-

ties. . . . Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seized of the whole, the estate is inseverable—cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are, at the time, husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law: *Arfield v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424.

Strictly speaking, estates by entireties are not joint tenancies: *Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412; the husband and wife being seized not of moieties, but both seized of the entirety *per tout* and not *per my*: *Jones v. Chandler*, 40 Ind. 588; *Davis v. Clark*, *supra*; *Arnold v. Arnold*, *supra*.

It has been said by this Court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants by the entirety. It is not even necessary that they be described as such or their marital relation referred to: *Morrison v. Seybold*, 92 Ind. 298; *Hadlock v. Gray*, 104 Ind. 596; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, *supra*; *Chandler v. Cheney*, *supra*.

But the Court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations, in the conveyance, which clearly indicate the creation of a different estate: *Hadlock v. Gray*, *supra*; *Edwards v. Beall*, 75 Ind. 401.

Having its origin in the fiction or common-law unity of husband and wife, the Courts of some States have held that married women's acts, extending their rights, destroyed estates by entirety, but this Court holds otherwise: *Carver v. Smith*, 90 Ind. 222.

And the greater weight of authority is in its favor. Our

decisions hold that neither, alone, can alienate such estate: *Jones v. Chandler, supra*; *Morrison v. Seybold, supra*.

There can be no partition: *Chandler v. Cheney, supra*.

A mortgage executed by the husband alone is void: *Jones v. Chandler, supra*.

And the same is true of a mortgage executed by both to secure a debt of the husband: *Dodge v. Kinzy, supra*.

And the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it: *State, ex rel., v. Kennett, 114 Ind. 160*.

A judgment against one of them is no lien upon it: *Barren Creek Ditching Co. v. Beck, 99 Ind. 247*; *McConnell v. Martin, 52 Ind. 434*; *Othwein v. Thomas, 13 N. E. Rep. 564*.

Upon the death of one, the survivor takes the whole in fee: *Arnold v. Arnold, supra*.

The deceased leaves no estate to pay debts: *Simpson v. Pearson, Admr., 31 Ind. 1*.

And, during their joint lives, there can be no sale of any part on execution against either: *Carver v. Smith, supra*; *Dodge v. Kinzy, supra*; *Hulett v. Inlow, supra*; *Chandler v. Cheney, supra*; *Davis v. Clark, supra*; *McConnell v. Martin, supra*; *Cox's Admr. v. Wood, 20 Ind. 54*.

The statutes extending the rights of married women have no effect whatever upon estates by entirety: *Carver v. Smith, supra*.

Such estate is, in no sense, either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent: *Enyeart v. Kepler, 118 Ind. 34*.

The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property, with us, for eighty-six years.

Section 2922, R. S. 1881, provides that "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following

section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife.

Under a statute of the State of Michigan, similar in all its essential qualities to our own, the Court held that "Where lands are conveyed, in fee, to husband and wife, they do not take as tenants in common :" *Fisher v. Provin*, 25 Mich. 347.

They take by entireties; whatever would defeat the title of one would defeat the title of the other : *Manwaring v. Powell*, 40 Mich. 371.

They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest, neither can be said to own an undivided half: *Aetna Ins. Co. v. Resh*, 40 Mich. 241 ; *Allen v. Allen*, 47 Mich. 74.

While the rule of entireties was predicated upon a fiction, the legislative intent, in this State, has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women : *Carver v. Smith*, *supra*.

"Where a rule of property has existed for seventy years and is sustained by a strong and uniform line of judicial decisions, there is but little room for the Court to exercise its judgment on the reasons on which the rule was founded. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. It is evident that the Legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply

intended to enlarge, in some particulars, the separate power of the wife, which existed already under the Acts of 1852 and the year following. . . ‘It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as joint tenants or tenants in common.’” *Carver v. Smith, supra.*

In *Chandler v. Cheney, supra*, the Court says: “It was a well-settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted.”

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended.

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

“A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose:” 1 Preston on Estates, 132; 2 Blackstone’s Com., Sharswood’s note; 4 Kent’s Com., side page 363; 1 Bishop on Married Women; Freeman on Co-Tenancy, § 72; *Fladung v. Rose*, 58 Md. 13 (24).

“And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common.” Stewart on Husband and Wife, §§ 307-310; Tiedeman on Real Property, § 244.

“And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise,” etc.: *Hoffman v. Stigers*, 28 Ia. 310; *Brown v. Brown*, 32 N. E. Rep. 1128.

“So it seems that husband and wife may, by express words,

be made tenants in common by gift to them during coverture." *McDermott v. French*, 15 N. J. Eq. 80.

In *Hadlock v. Gray*, 104 Ind. 596 (599), a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the Court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. . . . The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife."

The Court further says: "It is true that where real property is conveyed to husband and wife jointly and there are no limiting words in the deed, they will take the estate as tenants in entirety. . . . But while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself, determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife."

The Court then adopts the language of *Washburn, supra*, and *Tiedeman, supra*.

In *Edwards v. Beall, supra*, the Court hold that when lands are granted husband and wife, as tenants in common, they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife,

make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties—joint tenancy would be superseded or put in abeyance by the estate created by law-tenancy by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties but in joint tenancy. A joint tenant's interest in property is subject to execution: Freeman on Ex. 125.

Judgment reversed, with instructions to the Circuit Court to sustain the demurrer to each paragraph of the complaint.

At common law a conveyance to two or more persons, in the absence of words to the contrary, created a joint tenancy: *Gilbert v. Richards*, 7 Vt. 203. See, also, *Coster v. Lorillard*, 14 Wend. 265, 336; *Mette v. Feltgen*, 148 Ill. 357; 36 N. E. Rep. 81.

Joint tenancy is not favored in law or equity: *Galbraith v. Galbraith*, 3 S. & R. 392.

## ENTIRETY.

At common law the same form of words which, if the parties were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety, except where by statute the estate by entirety is abolished.

## WILSON v. WILSON.

Supreme Court of Minnesota, 1890.

43 Minn. 398.

Land was conveyed to "Alexander Wilson and Eleanor Wilson, husband and wife," to have and to hold "unto the said parties of the second part, their heirs and assigns forever."

GILFILLAN, C. J. The question in this case is, When a conveyance of real estate in fee is made to husband and wife, do they take as joint tenants, tenants in common, or do they become seized of the entirety, as it was called at the common law? An incident or property of this peculiar estate by the entirety, which it had in common with the estate in joint tenancy, was the right of survivorship. But, unlike the case of joint tenancy, neither of the parties could alien without the assent of the other. The reason for the rule upon conveyances to husband and wife, as given by Blackstone (book 2, c. 12, p. 182, Cooley's 2d ed.), was: "For, husband and wife being considered as one person in law, they cannot take the estate by moieties (that is, each taking an undivided half of the whole estate), but both are seized of the entirety *per tout et non per my.*" It would seem as though, the reason for the rule having ceased, and unity, so far as rights of property are concerned, no longer existing, the wife being as capable of taking and holding property as though she were unmarried, and she and her husband being no more considered as one person in the law as to property, there could no longer be any foundation for the rule. And the statute has very clearly abolished that sort of tenancy—that is, by the entirety. The Revised Statutes of 1851 enacted (chapter 43):

"Sec. 43. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.

"Sec. 44. All grants and devises of land made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

"Sec. 45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife."

It is not easy to see why § 43, if it stood alone, would not abolish any other classification of estates held by two or more persons, in respect to their connection, than that made by the section, and reduce them all to estates in severalty, in joint tenancy, and tenancy in common. As to whether such a section does have that effect the Courts in other States having similar statutes do not agree. But we are unable to see how full effect could be given to the language, as expressing the intention of the Legislature, than by holding that under that section alone there could be no such estate as by the entirety, and that upon a conveyance of the same tract to husband and wife they would take either as tenants in common or as joint tenants. How they would take, whether as tenants in common or joint tenants, would then be determined by § 44, were it not for § 45, which excepts from the operation of § 44 conveyances to husband and wife. Excepting such conveyances shows that in the mind of the Legislature they would come within the operation of § 44 unless excepted; that is, that the husband and wife would take as tenants in common unless in the grant or devise it should be expressly declared to be in joint tenancy. These sections of the statutes of 1851 remained until the revision of 1866. In that revision (c. 45) §§ 43 and 44 were retained without change. Section 45 was retained, leaving out the words, "or to husband and wife."

With that modification, the three sections are still in force, being §§ 43, 44, and 45 of chap. 45, Gen. St. 1878. The change made in 1866, by striking from § 45 the words, "or to husband and wife," leaving to apply to a grant or devise to them the rule which § 44 applies to all other grants or devises to two or more persons in their own right, was significant. It showed an intent that, upon a grant or devise to husband and wife, they should take and hold precisely the same as two or more other persons would upon a grant or devise to them; that is, as tenants in common, unless expressed to be in joint tenancy. Chapter 69 (of the revision of 1866) suggests a reason for it. Up to the time of that revision the common-law theoretical unity of husband and wife, and the common-law disabilities based upon it, continued. Upon the enactment of chapter 69 the unity of person, so far as related to rights of property, ceased to exist. After that the wife, with respect to taking, holding, and enjoying property, with some limitations, not based on any idea of her incapacity, but imposed to prevent frauds, was as though she were *sole*. The theoretical unity of person with respect to rights of property being done away with, it would have been inconsistent to retain any of the incidents of it. And we may suppose that, therefore, the Legislature in the same statute did away with a provision retained by reason of it, striking out the words, "or to husband and wife," from § 45, leaving applicable to grants or devises to them, the same rule that applies to grants or devises to two or more other persons in their own right.

Order affirmed.

But see: *Oglesby v. Bingham*, 69 Miss. 795; 13 S. Rep. 852; *Russell v. Russell*, 26 S. W. Rep. 677; *Noblitt v. Beebe*, 23 Or. 4; 35 Pac. Rep. 248; *Chambers v. Chambers*, 92 Tenn. 707; 23 S. W. Rep. 67; *In re Bramberry's Estate*, 156 Pa. St. 628; 27 Atl. Rep. 405.

## PARTNERSHIP ESTATES.

Where two or more partners purchase real property with partnership funds and for partnership purposes, they hold, as tenants in common, what may be termed an estate in partnership.

DYER v. CLARK.

Supreme Judicial Court of Massachusetts, 1843.

5 Met. 562.

SHAW, C. J. This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership, under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this; whether real estate, purchased by copartners, from partnership funds, to be held, used, and occupied for partnership purposes, is to be deemed in all respects real estate, in this Commonwealth, to vest in the partners severally as tenants in common, so that on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate, held by the deceased partner as tenant in common; or, whether it shall be regarded as *quasi* personal property, so as to be held and appropriated as personal property, first to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided, for the first time.

There are some principles, bearing upon the result, which seem to be well settled, and may tend to establish the grounds of equity and law upon which the decision must be made. It is considered as established law, that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take precedence

of a prior attachment of the same property for the debt of one of the partners. It is also considered, that however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners: 1 Ves. Sen. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and therefore much time may elapse, before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the fund.

When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity, that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice as such partner himself would have taken, had the partnership been dissolved in his lifetime; and such interest would be the net balance of the account, as above stated.

Such indeed is the result of the application of the well-known rules of law, when the partnership stock and property consist of personal estate only. And as partnerships were formed mainly for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandise, securities, and other personal property; and therefore the rules of law governing that relation would naturally be framed with more especial reference to that species of property. It is therefore

held, that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money, and the debts are paid; though, for the purpose of encouraging trade, it is held that the harsh doctrine of the *jus accrescendi*, which is an incident of joint tenancy, at the common law, as well in real as in personal estate, shall not apply to such partnership property; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is, whether there is anything so peculiar in the nature and characteristics of real estate, as to prevent these broad principles of equity from applying to it. So long as real estate is governed by the strict rule of the common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the policy of our law, still it would not accomplish the purposes of the parties; first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship, by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without liability to account, and thus wholly defeat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion, that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership; and since this Court has been fully em-

powered to take cognizance of all implied as well as express trusts, and carry them into effect, there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject, which have been adopted for the like purpose, in England and in some of our sister States. And it appears to us, that considering the nature of a partnership, and the mutual confidence in each other, which that relation implies, it is not putting a forced construction upon their act and intent, to hold than when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate, until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration, that the partners may have contributed to the capital stock in unequal proportions, or indeed that one may have advanced the whole. Take the case of a capitalist, who is willing to put in money, but wishes to take no active concern in the conduct of business, and a man who has skill, capacity, integrity, and industry to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equit-

able lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation; not because they have any lien, legal or equitable (2 Story on Eq., § 1253) upon the property itself; but on the equitable principle, which determines that the real estate, so held, shall be deemed to constitute part of the fund from which their debts are to be paid, before it can be legally or honestly diverted to the private use of the partners. Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die: The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner. The latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment, is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this, all those will take, who are entitled to the property; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner.

It may happen that real estate may be so purchased by partners, and out of partnership funds, in such manner as to preclude such implied trust, and indicate that the parties intended to purchase property to be held by them separately for their

separate use ; as where there is such an express agreement at the time of the purchase, or a provision in the articles of co-partnership, or where the price of such purchase should be charged to the partners respectively, in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust. If, in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one ; because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them. But, as we have already seen, such legal estate is not at all incompatible with an implied trust for the partnership.

The result of this part of the case seems to us to be this : that when, by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate—inasmuch as it is a well-known rule governing the relation of partnership, that neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the account settled ; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it ; the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this ; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs, clothed with a trust for the partners, in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone, without a breach of such trust ; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is

the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

But we think the same conclusion is well supported by authorities, although there has been some diversity of opinion amongst the earlier cases.

The adjudged cases were so fully examined by the counsel in their arguments, that it is unnecessary to state them in detail. The principles, which have already been suggested as the grounds on which we decide the present case, were applied in *Phillips v. Phillips*, 1 Mylne & Keen, 649 ; *Broom v. Broom*, 3 Myle & Keen, 443 ; *Sigourney v. Munn*, 7 Conn. 11 ; and *Hoxie v. Carr*, 1 Sumner, 173. In these cases, all the previous decisions on the subject were carefully considered. See, also, 3 Kent Com. (4th ed.) 36-39 ; 1 Story on Eq., §§ 674, 675 ; 2 Ib., § 1207 ; Collyer on Part. 76 ; Cary on Part., 27, 28 ; *Houghton v. Houghton*, 11 Simons, 491.

It has been supposed that the case of *Goodwin v. Richardson*, 11 Mass. 469, stands opposed to the decision now made. I do not think it does. That case was decided in 1814, before equity powers existed in this Commonwealth, on the general subject of trusts. It was in terms a question as to the vesting of the real estate ; and the Court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners, on foreclosure, as tenants in common. Had they decided the other way, they must have decided that partners, taking real estate in satisfaction of a partnership debt, by foreclosing a mortgage, would hold the estate as joint tenants, with right of survivorship at law, without liability to account—a principle directly opposed to the St. of 1785, c. 62, respecting joint tenancy ; because in that case and at that time the real estate must descend and vest according to the rules of law, and there was no Court of Equity competent to require the surviving partner to account with the representatives of the deceased party.

In that case, as it happened, both the separate estate and the partnership estate were insolvent, and therefore good justice would have been done, in deciding that the plaintiff should recover for the benefit of the partnership creditors. But the Court were deciding upon a rule of law, which must apply to all cases, and they could not have decided that for the plaintiff without holding that all such estate, held by partners, should be deemed joint estate, with a right of survivorship at law, and without liability to account; a rule opposed to the plainest principles of equity, and to the spirit, if not to the letter, of the statute respecting joint tenancy. The Court were dealing solely with a question of law, in determining a legal estate, and intimate that a Court of Equity might make joint real estate applicable, as personal, to the payment of partnership debts. We consider, therefore, that that decision is not opposed to the decision, upon equitable principles, to which we now propose to come.

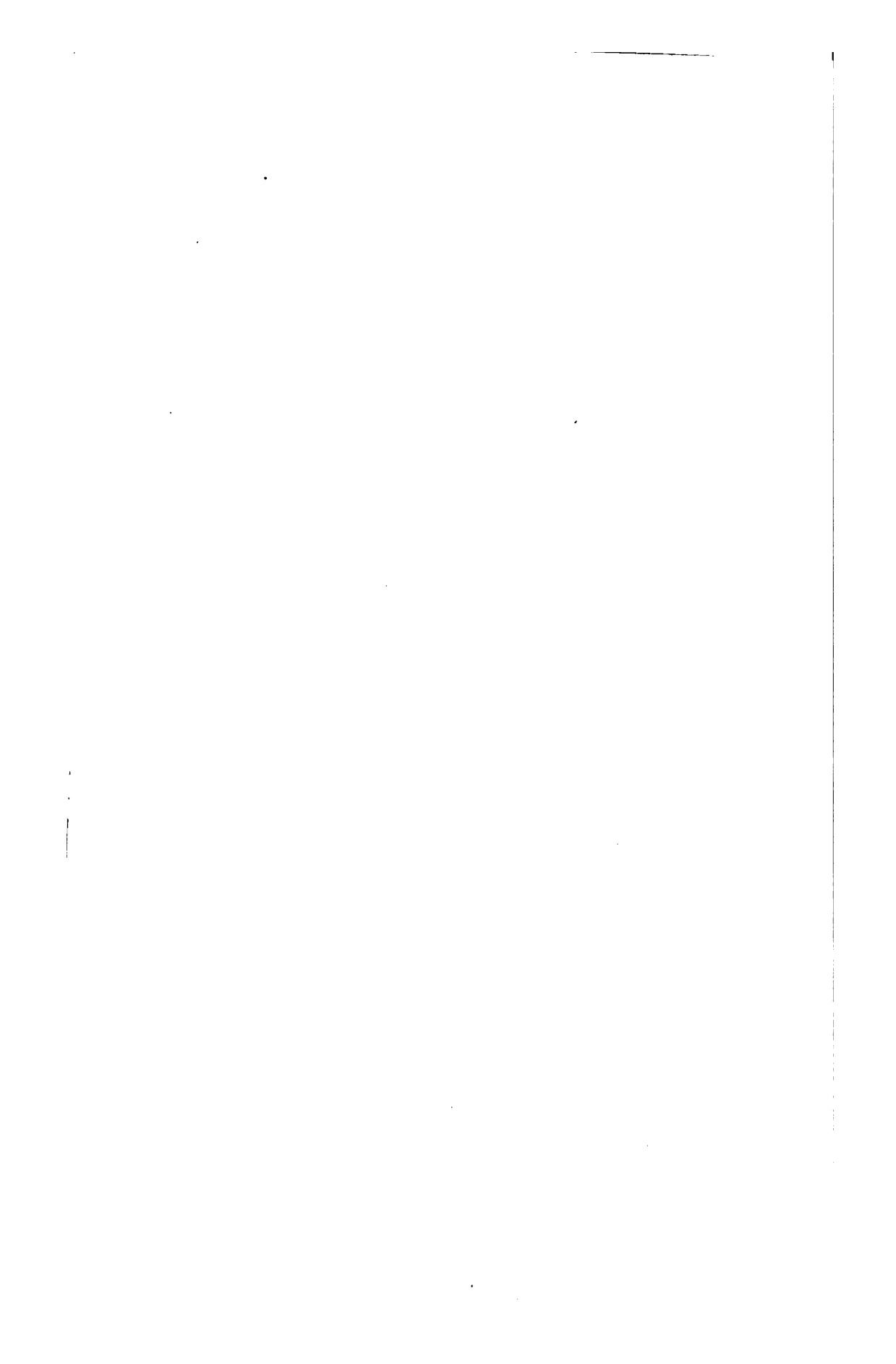
On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles, as distillers. The business required a large building and fixtures, which they purchased and paid for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property.

The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant, Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we cannot perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not

entitled to dower. For all beyond that, she will be entitled, because he held it as legal estate, unless she is barred by her release; of which we give no opinion.

The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrators as will be sufficient to discharge the balance of the partnership account; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.

A partnership, as such, cannot take and hold, in its firm name, the legal title to real property: *Tidd v. Rines*, 26 Minn. 201. See, also, *Gille v. Hunt*, 35 Minn. 357; *Morrison v. Mendenhall*, 18 Minn. 232; *German Land Assn. v. Scholler*, 10 Minn. 331; *Menage v. Burke*, 43 Minn. 211; *Howard v. Priest*, 5 Met. 582; *Arnold v. Wainwright*, 6 Minn. 358; *Heirs of Ludlow v. Cooper's Devisee*, 4 Ohio St. 1; *Blake v. Nutter*, 19 Me. 16.



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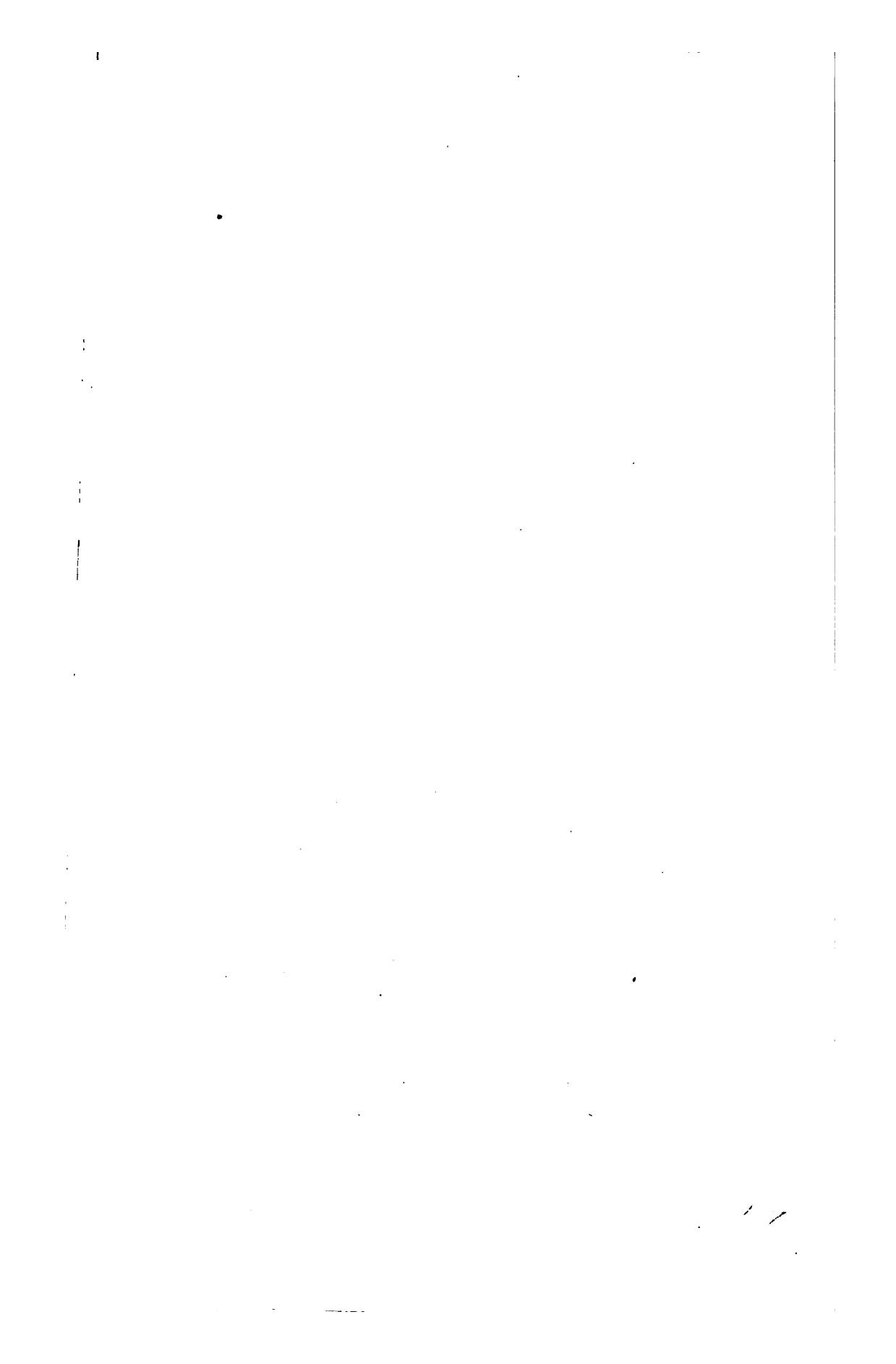
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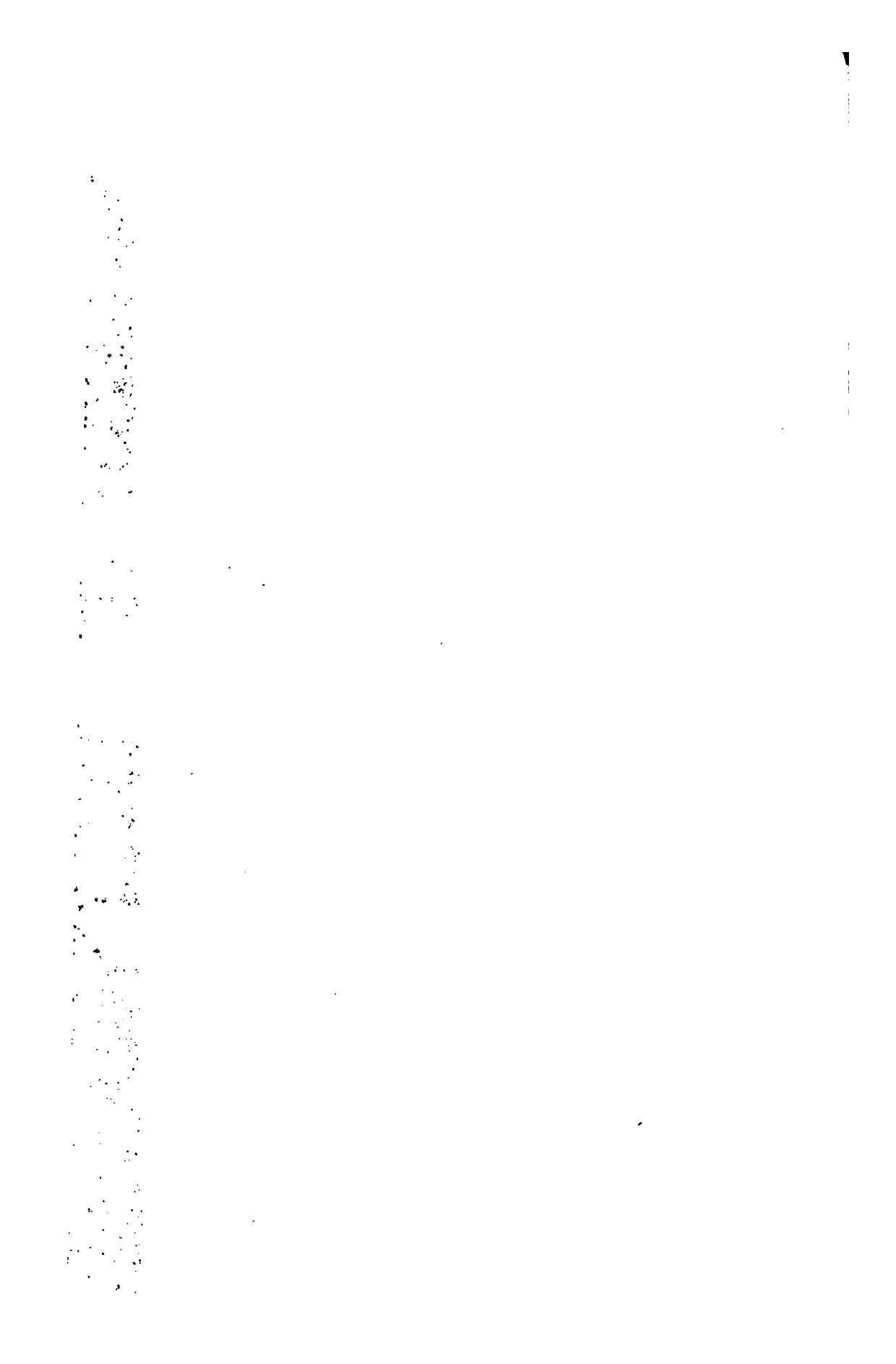
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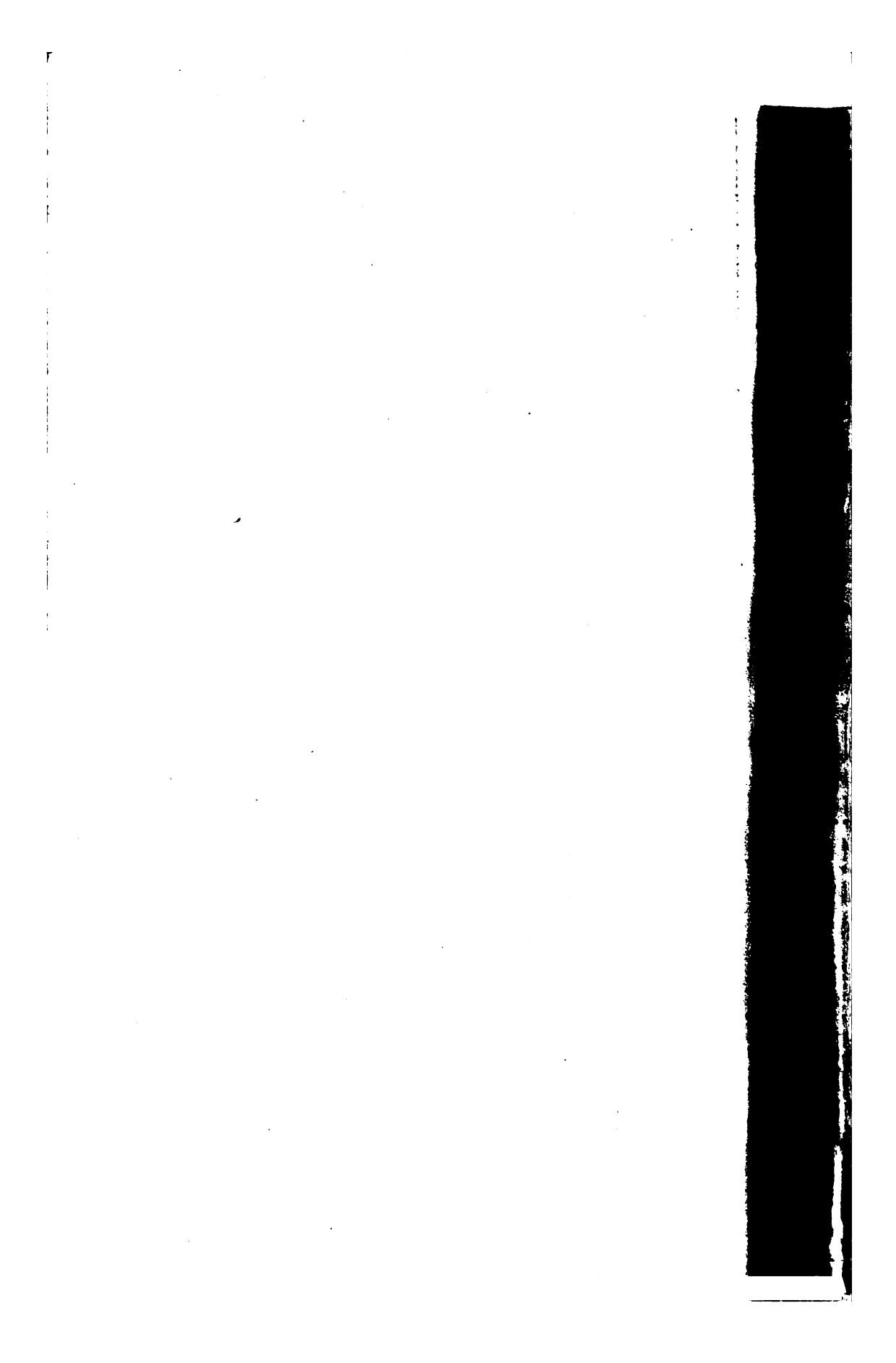
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